

APR 23 1992

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No. 91-1200

In The  
**Supreme Court of the United States**

October Term, 1991

THE CITY OF CINCINNATI,

*Petitioner,*

vs.

DISCOVERY NETWORK, INC., et al.,

*Respondents.*

On Writ Of Certiorari To The United States  
Court Of Appeals For The Sixth Circuit

JOINT APPENDIX  
VOLUME I, PAGES 1-205

MARK S. YURICK  
Assistant City Solicitor  
and Counsel of Record  
*Attorney for Petitioner*  
801 Plum Street  
Room 214, City Hall  
Cincinnati, Ohio 45202  
(513) 352-3321

FAY D. DUPUIS  
City Solicitor  
City of Cincinnati

JAMES F. MCCARTHY  
Chief Trial Counsel

MARC D. MEZIBOV  
*Counsel for Respondents*  
920 Fourth and Race Tower  
105 W. Fourth Street  
Cincinnati, Ohio 45202  
(513) 721-4876

**Petition For Certiorari Filed January 8, 1992**  
**Certiorari Granted March 9, 1992**

## TABLE OF CONTENTS

	Page
1) RELEVANT DOCKET ENTRIES.....	1
2) PLEADINGS, FINDINGS, CONCLUSIONS, OPINIONS.....	3
a) COMPLAINT.....	3
b) ANSWER.....	20
c) FINDINGS OF FACT AND CONCLUSIONS OF LAW.....	25
d) DISTRICT COURT JUDGMENT.....	35
e) DEFENDANT'S NOTICE OF APPEAL.....	36
3) JUDGMENT, ORDER, DECISION SOUGHT TO BE REVIEWED.....	37
a) SIXTH CIRCUIT DECISION.....	37
4) OTHER PARTS OF RECORD.....	59
a) DEPOSITION EXCERPT	
1) THOMAS E. YOUNG DEPOSITION EX- CERPT.....	59
b) EXCERPTS OF TRANSCRIPT OF PROCEEDINGS	
1) ROBERT H. RICHARDSON TESTIMONY..	62, 178
2) MARGARET MOERTL TESTIMONY.....	124
3) GREGORY G. GOFF TESTIMONY.....	149
4) THOMAS E. YOUNG TESTIMONY.....	89, 192

## TABLE OF CONTENTS - Continued

Page

## EXHIBITS

## Exhibit 1

June 1, 1984 Amended Regulation 38.....206

## Exhibit 2

February 17, 1989 Request to Place Newspaper Vending Device in Public Right-of-Way.....209

## Exhibit 3

July 13, 1989 Request to Place Newspaper Vending Device in Public Right-of-Way...213

## Exhibit 4

July 21, 1989 Letter from Thomas Young to Harmon Publishing Co.....222

## Exhibit 5

August 23, 1989 Letter from Ron Jackson to George Rowe and list of newsrack locations.....224

## Exhibit 6

February 7, 1990 Memorandum of Scott Johnson to Mayor and City Council.....229

## Exhibit 7

February 9, 1990 Letter from Jane V. Rogers to Letty C. Reifel and List of newsrack locations.....231

## Exhibit 8

March 8, 1990 Letter from George Rowe to Robert Harmelink.....236

## TABLE OF CONTENTS - Continued

Page

## Exhibit 9

March 8, 1990 Letter from George Rowe to Margaret Moertl.....238

## Exhibit 10

March 26, 1990 Letter from George Rowe to Christian Singles International.....240

## Exhibit 11

April 3, 1990 Letter from George Rowe to Monte Solovy.....242

## Exhibit 12

April 6, 1990 Letter from George Rowe to Margaret Moertl.....244

## Exhibit 13

May 1, 1990 Letter from George Rowe to Louis J. Maggiotto, Jr.....246

## Exhibit 14

June 14, 1990 Draft Administrative Regulation.....247

## Exhibit 15

June 14, 1990 Letter from William Johnston to George Rowe and list of newsrack locations.....253

## Exhibit 16

May 31, 1991 Administrative Regulation 67.362

## TABLE OF CONTENTS - Continued

	Page
Exhibit 17	
March 20, 1992 Revised Administrative Regulation 67.....	373
Exhibit 18	
List of newsrack locations <i>The Wall Street Journal</i> .....	386
Exhibit 19	
List of <i>New York Times</i> Vending Box Locations.....	396
Exhibit 20	
Seven Photographs of Dispensing Devices...	399

RELEVANT DOCKET ENTRIES

Discovery Network, et al., v. City of Cincinnati  
No. C1-90-437

United States District Court, Southern District of Ohio  
Western Division

6-1-90	Complaint, summons issued
6-4-90	Motion by Discovery Network, et al for temporary restraining order and preliminary injunction
6-4-90	Certificate by plaintiffs counsel
6-6-90	Order: Upon agreement with counsel defendant will not enforce Municipal code etc.
6-22-90	Answer
7-9-90	CIVIL MINUTES: Proceeding before Judge Spiegel that the motion for preliminary injunction is submitted on the merits
7-24-90	Transcript of proceedings (Preliminary injunction hearing on 7-9-90)
8-23-90	Findings of Fact and Conclusions of Law Judgment shall be entered in favor of the plaintiff as to the First Amendment issue and for the defendant as to the Fourteenth Amendment issue
8-23-90	Judgment entry
9-6-90	Motion by defendant City of Cincinnati for stay of execution of judgment pending appeal
9-10-90	Notice of Appeal by defendant City of Cincinnati
9-12-90	Record certified to United States Court of Appeals for the Sixth Circuit



10-19-90 Transcript of proceedings  
 10-30-90 Order Staying execution of judgment pending appeal

Discovery Network, et al., v. City of Cincinnati  
 No. 90-3817

United States Court of Appeals for the Sixth Circuit

9-20-20 Civil case docketed. Notice filed by Appellant  
 City of Cincinnati

10-11-91 Opinion filed: Affirmed

10-11-91 Judgment: Affirmed

1-13-92 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant  
 City of Cincinnati

3-16-92 U.S. Supreme Court order filed granting petition for writ of certiorari filed in the Supreme Court on 3-9-92

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UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF OHIO  
 WESTERN DIVISION

DISCOVERY NETWORK, INC.,	:	Case No.
d.b.a. Discovery Center,	:	C-1-90-437
an Ohio Corporation,	:	
1700 Madison Road	:	SPIEGEL, J.
Cincinnati, Ohio 45206	:	
And	:	<u>COMPLAINT</u>
HARMON PUBLISHING CO., INC.,	:	(Filed
a New Jersey Corporation,	:	Jun 1, 1990)
401 Market Avenue	:	
Canton, Ohio 44702	:	
Plaintiffs,	:	
-VS-	:	
THE CITY OF CINCINNATI,	:	
c/o Scott Johnson, City Manager,	:	
City Hall	:	
801 Plum Street	:	
Cincinnati, Ohio 45202	:	
Defendant.	:	

Now come Plaintiffs, Discovery Network, Inc., d.b.a. Discovery Center, and Harmon Publishing Co., Inc., which for their cause of action against the City of Cincinnati, Ohio, state as follows:

PRELIMINARY STATEMENT

1. This is a civil rights action brought by Discovery Network, Inc., an Ohio corporation doing business and

hereinafter referred to as "Discovery Center", and Harmon Publishing Co., Inc., a New Jersey corporation registered to do business in the State of Ohio, hereinafter referred to as "Harmon", to permanently enjoin enforcement of directives from the City of Cincinnati, Ohio, requiring Discovery Center and Harmon to remove newspaper dispensing devices from city property and to declare as unconstitutional the city's regulatory scheme upon which the directives are based.

### JURISDICTION

2. Jurisdiction is conferred upon this Court by 28 U.S.C. §1331, 28 U.S.C. §1343, 28 U.S.C. §2201 and §2202, and by 42 U.S.C. §1983 and §1988. This is a suit authorized by law to redress deprivations under color of state law of rights, privileges and immunities secured by the First and Fourteenth Amendments to the United States Constitution.

3. Venue in this Court is appropriate as the various acts, ordinances, regulations and directives from which Plaintiffs seek relief occurred or are being enforced within the Western Division of the Southern District of Ohio.

### PARTIES

4. Plaintiff, Discovery Center is an Ohio corporation which promotes and, for a fee, provides non-credit life long learning programs, recreational opportunities and social events for individuals within the Greater Cincinnati, Ohio area.

5. Plaintiff Harmon is a New Jersey corporation, registered and doing business as a foreign corporation in Ohio, which publishes and distributes magazines advertising real estate in various locations throughout the United States, including the greater Cincinnati area.

6. Defendant, the City of Cincinnati, is a municipal government and political subdivision in the State of Ohio and as such constitutes a "person" for purposes of 42 U.S.C. §1983.

### STATEMENT OF THE CASE

7. Discovery Center promotes and publicizes the nature and availability of its programs by means of a free magazine published nine (9) times per year. Currently, a substantial number of these magazines are distributed to the public through free-standing, metal newspaper dispensing machines approximately three (3') feet high, three (3') feet wide, and eighteen (18") inches deep. These newspaper dispensing devices are situated in thirty-eight (38) selected locations within the City of Cincinnati.

8. Harmon distributes its free publication, Home Magazine, through free-standing newspaper dispensing devices which are made of plastic and weighted with a forty (40 lb.) pound ballast in the base. These devices are situated in twenty-four (24) selected locations within the City of Cincinnati.

9. In order to place their respective newspaper vending devices on city property, Discovery Center and Harmon were each required to and, in fact, did submit to the Department of Public Works of the City of Cincinnati a

Request to Place Newspaper Vending Devices in Public Right-of-Way, pursuant to Regulation 38, which pursuant to Cincinnati Municipal Code, Section 911-17, details the city's regulatory scheme with respect to newspaper vending devices. See Exhibit "A" attached hereto.

10. Both Discovery Center and Harmon complied fully with the city's application process and with all conditions precedent to approval of their respective requests for permission to place newspaper vending devices in public right-of-way at specifically designated locations.

11. The City expressly approved the application of Discovery Center on or about February, 1989, and the application of Harmon on or about July 13, 1989. In conjunction with their initial grants of permission, Discovery Center and Harmon were each advised by city officials that their authority to maintain the newspaper vending devices at approved locations was contingent solely upon continued compliance with Regulation 38. Discovery Center and Harmon have continually been and remain in strict compliance with the terms, conditions and requirements of Regulation 38.

12. Notwithstanding its express grant of approval and Plaintiffs' consequent and foreseeable good faith reliance thereon, which has included the purchase, placement and maintenance of newspaper vending devices, the City issued directives to each of the Plaintiffs revoking the City's permission and requiring Plaintiffs to remove the newspaper vending devices from the city right-of-way on the ground that the publications distributed by Plaintiffs by means of newspaper vending

devices violate the City's proscription against the distribution of commercial handbills in any public place pursuant to Cincinnati Municipal Code, Section 714-23. See Exhibits "B" and "C" attached hereto.

13. Section 714-1-C of the Cincinnati Municipal Code defines a commercial handbill, in pertinent part, as any printed matter:

(a) which advertises for sale any merchandise, product, commodity or thing; or

(b) which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of either directly or indirectly promoting an interest thereof by sales; or

(c) which directs attention to or advertises any movie, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit.

14. Plaintiffs have been informed by representatives of the City that the ostensible reason why the City has revoked their permits is to serve the City's interest in promoting and enhancing public safety and aesthetics.

15. Upon information and belief, the City intends to allow certain other publishers to maintain newspaper dispensing devices in more than approximately eight hundred (800) locations on the city right-of-way notwithstanding the fact that these devices are similar, if not identical, in terms of purpose, size, shape and appearance to those owned, utilized and maintained by Plaintiffs.



16. In addition, the various publications distributed by these other publishers by means of newspaper dispensing devices all advertise for sale merchandise, products, commodities or things, or direct attention to businesses, mercantile or commercial establishments or direct attention to or advertise theatrical exhibits, events and performances for which an admission fee is charged for private gain or profit.

17. The publications distributed by Plaintiffs through their newspaper vending devices are constitutionally protected forms of expression since they contain information about lawful activities and contain absolutely no fraudulent or misleading information.

18. The regulatory scheme of the City set forth in Cincinnati Municipal Code, Sections 714-1-C, 714-1-N and Regulation 38, upon which the City issued its directives to Plaintiffs, is unconstitutional on its face because:

a. It vests the licensing authority of the City, the Department of Public Works, with unbridled discretion as to which publishers receive a permit to place newspaper dispensing devices on city right-of-way and fails to set forth meaningful criteria, standards and guidelines to distinguish between non-commercial speech which, according to the City's scheme, may be distributed on the city right-of-way, and commercial speech which, pursuant to the City's proscription, may not be;

b. It permits one publisher to utilize newspaper vending machines on the public right-of-way while it denies the same opportunity to other publishers based solely on the content of the materials distributed;

c. It effects a total ban on what the City, in its unbridled discretion, deems commercial speech without advancing a legitimate government interest by means of the most narrowly drawn regulation.

19. Further, as applied to Plaintiffs, the regulatory scheme and directives of the City violate Plaintiffs' rights to free speech and equal protection of the laws under the First and Fourteenth Amendments of the United States Constitution.

20. Finally, the City's directive, under color of state law, requires Plaintiffs to immediately remove their newspaper dispensing devices from the city right-of-way depriving Plaintiffs of rights, privileges and property without procedural due process in that the City's regulatory scheme and "ad hoc" appeal process fail to provide adequate notice of what activities are proscribed and contain no objective or meaningful guidelines to be applied by a neutral hearing officer with respect to the decision to revoke the City's permission to place and maintain newspaper dispensing devices on public property.

21. The inability of Plaintiffs to distribute their respective publications by means of newspaper vending devices will subject Plaintiffs to immediate and irreparable injury since there exists no available, comparable or adequate alternative means of distribution of their publications.

22. Unless operation of the City's regulatory scheme and directives to Plaintiffs are temporarily, preliminarily and permanently enjoined by this Court, Plaintiffs will suffer and will continue to suffer irreparable harm to their rights of free speech and equal protection of the laws for which no adequate remedy exists at law.



**PRAYER FOR RELIEF**

WHEREFORE, Discovery Center and Harmon each demand judgment:

1. Declaring that the administrative scheme by which the City regulates the use of newspaper vending devices in the city right-of-way is unconstitutional on its face and as applied to these Plaintiffs and, hence, is illegal and unenforceable;

2. Entering a preliminary and permanent injunction restraining, prohibiting and enjoining the City of Cincinnati, its agents and employees and all persons in active concert and participation with the City from enforcing, applying and implementing the ordinances, regulations and directive of the City which prohibit the distribution of publications through newspaper vending devices on the city right-of-way;

3. Awarding Plaintiffs their costs of this action and their reasonable attorneys fees pursuant to 42 U.S.C. §1988; and

4. Granting Plaintiffs such other and further relief as may be proper in the premises.

SIRKIN, PINALES, MEZIBOV  
& SCHWARTZ

/s/ Marc D. Mezibov  
MARC D. MEZIBOV -  
Ohio Bar No. 0019316  
Attorney for Plaintiffs  
920 Fourth & Race Tower  
105 West Fourth Street  
Cincinnati, Ohio 45202  
Telephone (513) 721-4876

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

DISCOVERY NETWORK, INC., : Case No.  
d.b.a. Discovery Center, :  
an Ohio Corporation, :  
1700 Madison Road :  
Cincinnati, Ohio 45206 :

And :

HARMON PUBLISHING CO., INC., :  
a New Jersey Corporation, :  
401 Market Avenue :  
Canton, Ohio 44702 :

Plaintiffs, :

-VS- :

THE CITY OF CINCINNATI, :  
C/O Scott Johnson, City Manager, :  
City Hall :  
801 Plum Street :  
Cincinnati, Ohio 45202 :

Defendant. :

**VERIFICATION**

STATE OF OHIO )  
 ) SS.  
COUNTY OF HAMILTON )

Margaret M. Moertl, being duly sworn, deposes and states that she resides in Cincinnati, Ohio; that she is the

Director of Discovery Network, Inc.; and that she has read the foregoing Complaint and knows the contents thereof; that the same, with respect to each averment concerning Discovery Network, Inc., is true to the best of her knowledge except as to those matters stated to be alleged on information and belief; and that as to those matters she believes them to be true.

/s/ Margaret M. Moertl  
MARGARET M. MOERTL

Sworn to and subscribed in my presence this 1 day of June, 1990.

Notorized Seal

/s/ Marc D. Mezibor  
Notary Public - State of Ohio

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

DISCOVERY NETWORK, INC., : Case No.  
d.b.a. Discovery Center, :  
an Ohio Corporation, :  
1700 Madison Road :  
Cincinnati, Ohio 45206 :  
And :

HARMON PUBLISHING CO., INC., :  
a New Jersey Corporation, :  
401 Market Avenue :  
Canton, Ohio 44702 :

Plaintiffs, :

-VS- :

THE CITY OF CINCINNATI, :  
C/O Scott Johnson, City Manager, :  
City Hall :  
801 Plum Street :  
Cincinnati, Ohio 45202 :

Defendant. :

VERIFICATION

STATE OF NEW YORK )  
 ) SS:  
COUNTY OF NEW YORK )

Louis J. Maggiotto, Jr., being duly sworn, deposes and states that he resides in New York City, New York; that he is Vice President and General Counsel of Harmon Publishing Co., Inc.; and that he has read the foregoing Complaint and knows the contents thereof; that the same, with respect to each averment concerning Harmon Publishing Co., Inc., is true to the best of his knowledge,

except as to those matters stated to be alleged on information and belief; and that as to those matters he believes them to be true.

/s/ Louis J. Maggiotto, Jr.  
LOUIS J. MAGGIOTTO, JR.

Sworn to and subscribed in my presence this 31 day of May, 1990.

/s/ Gloria Sofia  
Notary Public - State of New York  
GLORIA SOFIA  
NOTARY PUBLIC, State of New York  
No. 31-4860668  
Qualified in New York County  
Term Expires June 2, 1990

#### EXHIBIT "A"

#### AMENDED REGULATION NO. 38

In accordance with Section 911-17 of the Cincinnati Municipal Code, the following rules and regulations are promulgated in regard to the dispensing of newspapers of general circulation from devices located within the Public Right-of-Way.

1. All devices located within the public right-of-way for the purpose of dispensing newspapers must be shown on a site plan of the immediate vicinity of the device. The site plan must show all existing street furniture including other newspaper dispensing devices. The site plan shall be of such scale and detail

to allow the reasonable determination of pedestrian obstruction, aesthetics, driver sight distance and any other factor influencing the public safety. The method of attachment of each newspaper device to the sidewalk, post or other fixed object shall be depicted on the site plan. Where attachment is impracticable, an explanation of same is required. The site plan and request to place newspaper vending device in public right-of-way must be presented to and approved by the City Manager or his designee prior to the placement of the device. Approval or denial must be determined within five business days. A request to place newspaper vending device in the public right-of-way and site plan shall be in the form attached hereto as Exhibit A. The applicant shall have five business days to request an opportunity to object to a denial of permission or failure of the city to either approve or deny a request. The objection shall be heard within five business days of the objection. Such objection shall be heard by the City Manager or his designee.

A site plan is not required for devices in place as of the date of this Amended Regulation.

2. All persons, partnerships or corporations operating newspaper vending devices must provide the City Manager or his designee with a location inventory of such devices located within the public right-of-way. The location inventory must be updated yearly in July. Such inventory need not consist of a listing of locations, depiction on a street plat is acceptable. The initial inventory shall not be required until October 1, 1984. All devices must meet the site plan criteria as out-lined in item #1 above.
3. Placement of the newspaper dispensing device must be such that it is not accessible from that part of the right-of-way normally reserved for vehicular traffic



and does not obstruct normal pedestrian traffic, interfere with handicap access, create driver sight distance problems or otherwise create a public nuisance nor shall the method of attachment allow the device to be moved after placement to create these problems.

4. Each newspaper vending device shall be maintained and kept in good repair at all times. The owner/operator of newspaper dispensing devices within the public right-of-way shall have on file with the City Manager or his designee proof of current comprehensive liability insurance covering the newspaper dispensing devices they own. Compliance with this provision shall occur on or before July 17, 1984.
5. No advertising media shall appear on newspaper dispensing devices located within the public right-of-way except for the name and price of the publication, and promotion of the publication itself or written articles contained therein.
6. The owner/operator of newspaper dispensing devices within the public right-of-way must register a responsible contact person, a representative who can be reached during usual business hours, with the City Manager or his designee. This contact person shall be able to respond in a reasonable time to problems relative to the enforcement of these rules and regulations.
7. If, upon written notification or such other method of notification consistent with an emergency or critical situation, the owner/operator of a newspaper dispensing device fails to remedy violations of these rules and regulations and/or relevant sections of the Cincinnati Municipal Code, the offending dispensing device, shall be removed from the right-of-way and the owner/operator shall be billed for the cost of the removal and storage of the device. In all non-emergency situations, the owner/operator shall have five

business days to request an opportunity to object to the order to remedy violations. The objection of the owner/operator shall be heard within five business days of the request. Such objection shall be heard by the City Manager or his designee.

Approved:

/s/ Sylvester Murray  
Sylvester Murray

Dated: June 1, 1984

EXHIBIT "B"

City of Cincinnati

[SEAL]

Department of Public Works

Room 450, City Hall  
801 Plum Street  
Cincinnati, Ohio 45202  
George Rowe, P.E.  
*Director of Public Works*

April 6, 1990

Margaret M. Moertle  
Discovery Center  
1700 Madison Road  
Cincinnati, Ohio 45206

Dear Ms. Moertle:

On April 5, 1990 the City of Cincinnati heard your appeal concerning the revocation of Discovery Network's permit to distribute its publication in the right-of-way. Pursuant



to Section 714-23 of the Cincinnati Municipal Code Discovery Center has been found to be a commercial handbill. You hereby are notified that you have thirty days from the date of this letter to remove the Discovery Center racks from the public right-of-way.

Very truly yours,  
/s/ T E Young  
for George Rowe  
Director of Public Works

---

EXHIBIT "C"

City of Cincinnati

[SEAL]

---

Department of Public Works	Room 450, City Hall 801 Plum Street Cincinnati, Ohio 45202 George Rowe, P.E. <i>Director of Public Works</i>
----------------------------	--

May 1, 1990

Louis J. Maggiotto Jr.  
Harmon Publishing  
667 Madison Avenue  
New York, New York 10021

Dear Mr. Maggiotto:

On April 26, 1990 the City of Cincinnati heard your appeal concerning the revocation of Harmon Publishing's permit to distribute its publication in the right-of-way. Pursuant to Section 714-23 of the Cincinnati Municipal

Code 'Homes Magazine' has been found to be a commercial handbill. You hereby are notified that you have thirty days from the date of this letter to remove the Harmon Publishing racks from the public right-of-way.

Very truly yours,  
/s/ George Rowe  
George Rowe  
Director of Public Works

---

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

DISCOVERY NETWORK,	:	CASE NO.
INC., et. al.,	:	C-1-90-437
PLAINTIFFS,	:	<u>JUDGE SPIEGEL</u>
-VS-	:	ANSWER OF
THE CITY OF	:	DEFENDANT
CINCINNATI	:	CITY OF
DEFENDANT	:	CINCINNATI

Now comes defendant City of Cincinnati, by and through counsel, and for its answer to plaintiffs' complaint hereby states as follows:

1. Defendant denies all allegations contained in paragraphs 1 and 2 of plaintiffs' complaint.

2. Defendant admits that venue is proper as alleged in paragraph 3 of plaintiffs' complaint.

3. Defendant is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraphs 4 and 5 of plaintiffs' complaint, therefore all of those allegations are hereby denied.

4. Defendant admits the allegations contained in paragraph 6 of plaintiffs' complaint.

5. Defendant is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraphs 7 and 8 of plaintiffs' complaint, therefore those allegations are hereby denied.

Furthermore, defendant specifically denies that any dispensing device utilized by plaintiffs constitutes a "newspaper dispensing device" as alleged.

6. Defendant admits that a request was filed, but denies all other allegations contained in paragraphs 9 and 10 and further states that plaintiffs do not distribute "newspapers of general circulation".

7. Defendant admits that one of its employees did approve plaintiffs' application, but denies all other allegations contained in paragraph 11 of plaintiffs' complaint.

8. Defendant admits that it has directed plaintiffs to remove their commercial handbill dispensers from the public right of ways pursuant to section 714.23 of the Cincinnati Municipal Code, and further specifically denies all remaining allegations contained in paragraph 12 of plaintiffs' complaint.

9. Defendant admits that Section 714-1-C of the Cincinnati Municipal Code defines commercial handbills as alleged in paragraph 13 of plaintiffs' complaint.

10. Defendant admits that the reason plaintiffs must remove their commercial handbill dispensers is the defendant's interest in promoting and enhancing public safety and aesthetics as alleged in paragraph 14 of plaintiffs' complaint.

11. Defendant admits that it will allow newspapers of general circulation to distribute newspapers in newsracks, but denies all other allegations contained in paragraph 15 of plaintiffs' complaint.

12. Defendant admits that it will allow distribution of newspapers of general circulation in public right of ways and further admits that some newspapers of general circulation may contain some of the elements listed in paragraph 16 of plaintiffs' complaint, however defendant denies all additional allegations contained in paragraph 16 of plaintiffs' complaint.

13. Defendant denies all allegations contained in paragraphs 17 through 22 of plaintiffs' complaint.

14. Defendant hereby specifically denies all allegations contained in plaintiffs' complaint not herein specifically admitted to be true.

#### Second Defense

15. Plaintiffs' complaint fails to state a claim upon which relief may be granted.

#### Third Defense

16. Failure to join necessary and indispensable parties.

#### Fourth Defense

17. Section 714.23 of the Cincinnati Municipal Code constitutes a reasonable time, place and manner restriction.

#### Fifth Defense

18. The provision of the Cincinnati Municipal Code dealing with commercial handbills, when considered in connection with provisions of the Cincinnati Municipal Code dealing with newspapers of general circulation, does not grant government officials "unbridled discretion" to determine what speech is prohibited.

#### Sixth Defense

19. The provisions of the Cincinnati Municipal Code Section 714.23 restricts only one means of distributing [sic] commercial speech and seeks to implement a substantial governmental interest, directly advances that interest, and reaches no further than necessary to accomplish the given objective.

#### Seventh Defense

20. Defendant acted in good faith and with a reasonable belief that its actions were in accordance with the law.

#### Eighth Defense

21. Plaintiffs lack standing to challenge the facial validity of defendant's ordinance.

#### Ninth Defense

22. Defendant did not cause, acquiesce or ratify any constitutional violation.



Wherefore, defendant prays that plaintiffs' complaint be dismissed, prays for costs and all other relief that the court determines it is entitled.

Respectfully submitted,

/s/ Richard A. Castellini  
RICHARD A. CASTELLINI  
 (0017613)  
 City of Cincinnati  
 Solicitor

/s/ Mark S. Yurick  
MARK S. YURICK  
 (0039176)  
 Assistant City Solicitor  
 Attorney for Defendants  
 Appellants  
 Room 214 City Hall  
 801 Plum Street  
 Cincinnati, Ohio 45202

#### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer of Defendant has been sent to Marc Mezibov, Esq., at Sirkin, Pinales, Mezibov and Schwartz, 105 West Fourth Street, Cincinnati, Ohio 45202, by ordinary U.S. Mail on this 21st day of June 1990.

#### UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

DISCOVERY NETWORK,	:	No. C-1-90-437
INC., et al.,	:	
	:	FINDINGS OF
Plaintiffs,	:	FACT AND
	:	CONCLUSIONS
vs.	:	OF LAW
CITY OF CINCINNATI,	:	(Filed 90 AUG 23)
	:	
Defendants.	:	

This matter came before the court for an evidentiary hearing on July 9, 1990. This is a civil action brought pursuant to 42 U.S.C. § 1983. The plaintiffs allege that defendant City of Cincinnati's statutory scheme prohibiting the distribution of commercial handbills in the public right of way violates plaintiffs' First Amendment right to freedom of speech and Fourteenth Amendment right to procedural due process. The plaintiffs seek declaratory and injunctive relief. The contested issues of law and fact relate to whether plaintiffs' publications are commercial speech, whether defendant's regulatory scheme violated plaintiffs' First Amendment rights, and whether defendant failed to provide a meaningful opportunity for plaintiffs to gain rescission of defendant's directives. We find that plaintiffs' publications constitute commercial speech, that defendant's statutory scheme violates plaintiffs' First Amendment rights, and that defendant did not fail to provide a meaningful opportunity for plaintiffs to appeal the defendant's directives.

In rendering our decision on this matter, we have considered the testimony of the witnesses, the documents



admitted into evidence, plaintiffs' trial brief (doc. 9), defendant's trial brief (doc. 6), the proposed findings of fact and conclusions of law submitted by the plaintiffs (doc. 8) and the defendant (doc. 7), and the supplemental proposed findings of fact and conclusions of law submitted by the plaintiffs (doc. 14) and the defendant (doc. 13). In weighing the testimony of the witnesses, we considered each witness' relationship to the plaintiff or the defendant; their interest, if any, in the outcome of the trial; their manner of testifying; their opportunity to observe or acquire knowledge concerning the facts about which they testified; and the extent to which they were supported or contradicted by other credible evidence.

Pursuant to Fed. R. Civ. P. 52, we set forth our findings of fact and conclusions of law as follows:

#### FINDINGS OF FACT

1. The plaintiff, Discovery Center, is an Ohio corporation that, for a fee, provides non-credit educational, recreational and social programs to interested individuals in the greater Cincinnati, Ohio area.

2. The plaintiff, Harmon Publishing Company, is a New Jersey corporation registered and doing business as a foreign corporation in Ohio which publishes and distributes magazines advertising real estate in various locations throughout the United States, including the greater Cincinnati, Ohio area.

3. Discovery Center promotes and publicizes the nature and availability of its programs by means of a free

magazine published nine (9) times per year. Approximately one-third (1/3) of these magazines are distributed to the public through free-standing, metal dispensing devices situated in thirty-eight (38) locations within the City of Cincinnati.

4. Harmon Publishing Company advertises its real estate offerings through its free publication, Home Magazine. Approximately fifteen percent (15%) of those magazines are distributed to the public through free-standing, weighted, plastic dispensing devices situated in twenty-four (24) locations within the City of Cincinnati.

5. Pursuant to Cincinnati Municipal Code, Section 714-23, the City prohibits the distribution on public property of all publications deemed "commercial handbills" by a city official.

6. Section 701-1-C of the Cincinnati Municipal Code defines "commercial handbills" as follows:

Commercial handbill shall mean any printed or written matter, any sample or device, dodger, circular, leaflet, pamphlet, paper, booklet or otherwise reproduced original or copies of any matter of literature:

(a) which advertises for sale any merchandise, product, commodity or thing; or

(b) which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of either directly or indirectly promoting the interest thereof by sales; or

(c) which directs attention to or advertises any meeting, theatrical performance, exhibition or

event of any kind for which an admission fee is charged for the purpose of private gain or profit.

7. Section 911-17 and Section 862-1 of the Cincinnati Municipal Code specifically authorize the distribution of "newspapers" on the public right of way. There are fifteen hundred to two thousand (1500 - 2000) newspaper vending devices currently on the public right of way. Neither plaintiff publishes a newspaper.

8. Other communities with similar difficulties promote safety and aesthetics by regulating the size, shape, number or placement of such devices. Such regulation allows the city to control the visual effect of the devices and to keep them from interfering with public safety without completely prohibiting them.

9. On or about February 7, 1989, Discovery Center submitted a "Request to Place Newspaper Vending Devices on Public Right-of-Way" which was approved by an official in the City's department of Public Works.

10. On or about July 13, 1989, Harmon Publishing Company submitted a "Request to Place Newspaper Vending Devices on Public Right-of-Way" which was approved by an official in the City's Department of Public Works.

11. Home Magazine consists primarily of listings and photographs of available residential properties in the greater Cincinnati area but occasionally includes information about market trends or other real estate related matters.

12. The Discovery Magazine primarily contains information intended to directly promote registration in the courses Discovery provides, but it also contains some information about current events, activities and topics which may be of public interest.

13. On or about March 8, 1990, the City, through its Director of the Department of Public Works, notified Discovery Center that its publication constitutes a "commercial handbill," and ordered Discovery Center to remove its dispensing devices from the City's right of way pursuant to Cincinnati Municipal Code Section 714-23. Discovery Center was informed of its right to an administrative hearing with respect to the City's order.

14. On or about March 8, 1990, the City, through its Director of the Department of Public Works, notified Harmon Publishing Company that its publication constitutes a "commercial handbill," and ordered Harmon Publishing Company to remove its dispensing devices from the City's right of way pursuant to Cincinnati Municipal Code Section 714-23. Harmon Publishing Company was informed of its right to an administrative hearing with respect to the City's order.

15. An administrative hearing regarding the City's order as to Discovery Center's dispensers occurred on April 5, 1990.

16. An administrative hearing regarding the City's order as to Harmon Publishing's dispensers occurred on April 26, 1990.



17. Plaintiffs' appeals were heard by the Sidewalk Appeals Committee. The individuals who sat on the Sidewalk Appeals Committee were the City Engineer, the Assistant City Solicitor, and the Director of Public Works or his designee. All of these officials participated directly in the original decisions to revoke plaintiffs' permits on the grounds that plaintiffs' publications constitute commercial handbills.

18. Plaintiffs' petitions were denied, and they were requested to remove their dispensing devices.

19. The City of Cincinnati has agreed not to interfere with plaintiffs' dispensing devices until a ruling on the merits of this case is made. Those devices are still present in the public right of way.

#### CONCLUSIONS OF LAW

1. The test for identifying commercial speech is whether the communications "propose a commercial transaction." *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

2. Where commercial and noncommercial speech are "inextricably intertwined," the entire communication is classified as noncommercial. *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988). Noncommercial aspects of speech are "inextricable" where it is impossible to sell the advertised items without the noncommercial speech or where the noncommercial speech is required to be combined with commercial message. *Board of Trustees of State University of New York v. Fox*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 3028 (1989).

3. The publications distributed by Discovery Center and Harmon Publishing Company constitute forms of commercial speech. Both publications propose commercial transactions in that they are primarily intended as advertisements. Home Magazine, published by Harmon Publishing, advertises real estate available in the greater Cincinnati area. Discovery Center's publication is intended to advertise for-profit programs offered by Discovery Center. Neither publication contains noncommercial speech that is inextricably intertwined with the commercial speech. There is no law requiring the editorials in question to be published together with advertisements for educational or social programs or real estate.

4. Commercial speech is entitled to First Amendment protections if it concerns lawful activity and it is not misleading. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980).

5. The publication distributed by Discovery Center and Harmon Publishing Company are entitled to First Amendment protections. Both publications concern lawful activity and neither publication is misleading.

6. The City of Cincinnati may regulate publication dispensing devices pursuant to its substantial interest in promoting safety and aesthetics on or about the public right of way. *See City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

7. A government restriction on commercial speech is valid if "the regulation directly advances the governmental interest asserted, and . . . it is not more extensive than is necessary to serve that interest." *Central Hudson*

*Gas & Electric Co.*, 447 U.S. at 556. This test does not require that the regulation be the least restrictive means available to further the interest. *Board of Trustees of State University of New York v. Fox*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 3028 (1989). Rather, it requires a reasonable "'fit' between the legislature's ends and the means chosen to accomplish those ends." *Id.* at 3035 (quoting *Posadas de Puerto Rico Assocs. v. Tourism Company of Puerto Rico*, 478 U.S. 328, 341 (1986)). The fit must be "one whose scope is 'in proportion to the interest served.'" *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

8. The burden is on the government to affirmatively establish the reasonable fit required. *Id.*

9. Based upon these standards, we find that the City of Cincinnati has failed to affirmatively establish such reasonable fit. Complete prohibition of commercial handbills on any public right of way is an excessive means by which to accomplish the governmental objectives of safety and aesthetic appeal. The "fit," in this case, is unreasonable. The number of dispensers dispensing commercial handbills (62) on the public right of way is minute in comparison to the total number of dispensing devices on the street (1500 - 2000), and such dispensers effect public safety and aesthetics in only a minimal way. Other communities with similar difficulties promote safety and aesthetics by regulating the size, shape, number or placement of such devices. Such regulation allows the city to control the visual effect of the devices and to keep them from interfering with public safety without completely prohibiting the speech in question. This court has no doubt that the city acted in good faith,

here, with the intent only to protect the citizens of Cincinnati. However, freedom of speech is a fundamental constitutional right, and the city acted somewhat overzealously in executing its good intentions. While the City's objectives of promoting safety and aesthetics are substantial, complete prohibition of the devices in question is unreasonable and violative of plaintiffs' fundamental First Amendment rights.

10. A basic requirement of due process is a fair trial before a fair tribunal. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *In re Murchison*, 349 U.S. 133 (1955). This rule is equally applicable to administrative agencies which adjudicate issues. *Withrow v. Larkin*, 421 U.S. 35 (1975). The fact that the same agency or persons combine both investigative and adjudicative functions does not necessarily create an unconstitutional risk of bias. *Larkin*, 421 U.S. at 47. One who makes such a contention has a "much more difficult burden of persuasion to carry." *Id.* The plaintiff must overcome a presumption of honesty and integrity in those individuals serving as administrative adjudicators. *Id.* The fact that those on the adjudicating committee have previously stated that a request should be denied based on its prior *ex parte* investigation does not necessarily mean that the minds of its members were irrevocably closed to the merits of plaintiffs' arguments. *Id.* at 48.

11. Based upon these standards, we find that the mere fact that the same individuals who made the original decision also sat on the Sidewalk Appeals Committee is not sufficient to deem the practice unconstitutional. The original decision was based on its prior *ex parte* investigation. The final decision was made by the Sidewald [sic] Appeals Committee after hearing arguments by



each plaintiff. There is no allegation that the city officials acted dishonestly or in bad faith. The plaintiffs have failed to overcome the presumption of honesty and integrity in those individuals serving as administrative adjudicators.

### CONCLUSION

Accordingly, for the reasons set forth above, we find that the regulatory scheme advanced by the City of Cincinnati completely prohibiting the distribution of commercial handbills on the public right of way violates the First Amendment. However, the manner in which the City currently handles appeals of decisions regarding permits that are denied does not violate the Fourteenth Amendment. Judgment shall be entered in favor of the plaintiff as to the First Amendment issue and for the defendant as to the Fourteenth Amendment issue.

SO ORDERED.

Dated: 8/21/90

/s/ S. Arthur Spiegel  
S. Arthur Spiegel  
United States  
District Judge

AO 450 (Rev. 5/85) Judgment in a Civil Case

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### UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO - WESTERN DIVISION

DISCOVERY NETWORK,  
INC. et al

JUDGMENT IN  
A CIVIL CASE

V.

CASE NUMBER:

CITY OF CINCINNATI

C-1-90-437

— **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment entered in favor of the plaintiff as to the First Amendment issue and for the defendant as to the Fourteenth Amendment issue.

23 August 1990

Date

KENNETH J. MURPHY

Clerk

/s/ Illegible

(By) Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

DISCOVERY NETWORK,  
INC.,

and

HARMON PUBLISHING  
CO., INC.,

Plaintiffs,

-vs-

CITY OF CINCINNATI,  
Defendant.

Notice is hereby given that Defendant City of Cincinnati, above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final judgment in favor of the plaintiffs entered in this action on the twenty-third (23rd) day of August 1990.

Respectfully submitted,

/s/ Richard A. Castellini  
RICHARD A. CASTELLINI  
(0017613)  
City Solicitor

/s/ Mark S. Yurick  
MARK S. YURICK  
(0039176)  
Assistant City Solicitor  
Trial Attorneys for Defendant  
City of Cincinnati  
Room 214, City Hall  
801 Plum Street  
Cincinnati, Ohio 45202  
Telephone: 513/352-3329

APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION  
Pursuant to Sixth Circuit Rule 24

No. 90-3817

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

DISCOVERY NETWORK, INC. and )  
HARMON PUBLISHING CO., )  
Plaintiffs-Appellees, )

v. )

CITY OF CINCINNATI, ) ON APPEAL from the  
Defendant-Appellant. ) United States District  
Court for the Southern  
District of Ohio

Decided and Filed October 11, 1991

Before: KRUPANSKY and BOGGS, Circuit Judges;  
and DUGGAN, District Judge.\*

BOGGS, Circuit Judge. The case involves the constitutionality of Cincinnati's ordinance prohibiting the distribution of commercial handbills on public property.

\*The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

This ordinance effectively grants distributors of "news-papers," such as the *Cincinnati Post*, *USA Today*, and the *Wall Street Journal*, access to the public sidewalks through newsracks, while denying that same access to distributors of "commercial handbills." The district court rendered a judgment preventing enforcement of this ordinance because it violates the first amendment. The city appealed, arguing that the ordinance was constitutionally permissible as a regulation of "commercial speech" because of the "lesser protection" such speech is afforded under the first amendment. Because we believe that "commercial speech" only receives lesser first amendment protection when the governmental interest asserted is either related to regulating the commerce the "commercial speech" is promoting, or related to any distinctive effects such commercial activity would produce, and neither governmental interest is asserted here, we affirm the district court.

# I

Plaintiffs are publishers of publications distributed throughout the Cincinnati metropolitan area. Discovery Network publishes a magazine that advertises learning programs, recreational opportunities, and social events for adults. Harmon Publishing publishes and distributes *Home Magazine*, which lists houses and other residential real estate for sale or rent. Both plaintiffs use newspaper dispensing devices ("newsracks") placed on public right-of-ways to distribute their publications.

Both plaintiffs had been given permission by the city to place newsracks along public right-of-ways to distribute their publications according to Amended Regulation

38.<sup>1</sup> Their status changed, however, in February 1990 when the City Council passed a motion requiring the Department of Public Works to enforce the existing ordinance prohibiting the distribution of "commercial handbills" on public property. *Cincinnati Municipal Code* § 714-23.<sup>2</sup> Plaintiffs brought suit under 42 U.S.C. § 1983,

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<sup>1</sup> The Amended Regulation reads in pertinent part as follows:

1. All devices located within the public right-of-way for the purpose of dispensing newspapers must be shown on a site plan of the immediate vicinity of the device. . . . The site plan and request to place newspaper vending device [sic] in public right-of-way [sic] must be presented to and approved by the City Manager or his designee prior to the placement of the device. . . .
3. Placement of the newspaper dispensing device must be such that it is not accessible from that part of the right-of-way normally reserved for vehicular traffic and does not obstruct normal pedestrian traffic, interfere with handicap access, create driver sight distance problems or otherwise create a public nuisance nor shall the method of attachment allow the device to be moved after placement to create these problems. . . .
6. The owner/operator of newspaper dispensing devices within the public right-of-way must register a responsible contact person . . . with the City Manager. . . . This contact person shall be able to respond in a reasonable time to problems relative to the enforcement of these rules and regulations.

<sup>2</sup> A "commercial handbill" is defined as:  
any printed or written matter, any sample or device, dodger, circular, leaflet, pamphlet, paper, booklet or  
(Continued on following page)



requesting declaratory and injunctive relief. This case ultimately came before the district court for an evidentiary hearing on two issues: whether the regulation violated plaintiffs' first amendment rights, and whether the city's mechanism for appealing the administrative decision to enforce the ordinance violated plaintiffs' right to due process.

The court held that hearing on July 9, 1990. In that hearing, the city contended that the newsracks pose aesthetic and safety problems for the city. The aesthetic problems arise because of the non-uniform design and color schemes of the different types of newsracks. The safety problems arise because the racks are placed near busy streets, especially near crosswalks and bus stops. They are also attached by chains to city fixtures, such as lightpoles, causing the fixtures to rust. However, there

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(Continued from previous page)

otherwise reproduced original or copies of any matter of literature:

- (a) which advertises for sale any merchandise, product, commodity or thing; or
- (b) which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of either directly or indirectly promoting the interest thereof by sales; or
- (c) which directs attention to or advertises any meeting, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit.

*Cincinnati Municipal Code* § 701-1-C.

are currently no city regulations establishing any safety or aesthetic standards for newsracks.

Neither the City Architect nor the City Engineer could distinguish the commercial from the non-commercial newsracks. In fact, the Architect testified that the city's aesthetic concerns would be alleviated by an ordinance regulating the color and size of all newsracks. Both witnesses seemed primarily concerned about the potential proliferation of the total number of newsracks as a result of newsracks distributing commercial speech. The Engineer testified that the only areas in which commercial newsracks differed from non-commercial newsracks was in the potential for proliferation, and in the enhanced first amendment protection accorded to devices dispensing non-commercial publications. He believed such proliferation was likely because he had received four requests for permits from commercial publishers for newsrack permits in the prior two years, the first such requests he had ever received.<sup>3</sup> The Architect's testimony

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<sup>3</sup> This argument rests on the assumption that there is an infinite number of commercial publishers who might seek permits, but only a finite number of non-commercial publishers. In light of the growing nationalization of newspapers in this country, that assumption is somewhat tenuous at best. The city provided no direct evidence regarding the increase in the number of non-commercial publishers dispensing their wares through newsracks. However, the Architect testified that "it was not very long ago that the *Cincinnati Post* and the *Cincinnati Enquirer* were the only ones with dispensing devices on the City streets." We take judicial notice of the fact that *USA Today*, the *New York Times*, the *Wall Street Journal*, and the *Business Courier* all have dispensing devices on the corner across from the Federal Courthouse.

followed the Engineer's, as he believed that permitting plaintiffs' newsracks to remain would send a signal to other commercial publishers that newsracks were a permissible way to distribute the publications, thereby increasing the number of racks.

The court ruled in favor of the city on the due process claim, but in favor of the plaintiffs on the first amendment claim. The court reached many conclusions of law: that the publications were commercial speech within the meaning of the first amendment because they proposed commercial transactions in the form of advertisements;<sup>4</sup> that commercial speech was entitled to first

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<sup>4</sup> In this case, plaintiffs do not question the contours of the delineation between "commercial" and "non-commercial" speech. We will thus adopt and adhere to that terminology, although we find it somewhat anomalous to denominate as "non-commercial" institutions such as the *New York Times* and Gannett (publisher of the *Cincinnati Post*), each of which has assets and revenues in the billions of dollars, and profits in the many millions of dollars.

Obviously, a quite significant part of the space in "news-papers" is devoted to purely commercial activities, while publications such as plaintiffs' may (and certainly could easily) contain some editorial material, such as comments or articles on education or real estate matters. The first amendment by its terms does not make this distinction; it protects "speech." An analogous practice, deciding on content-based grounds which beliefs merit classification as "religion" protected by the establishment and free exercise clauses of the first amendment, has been severely limited by courts to avoid impermissible government interference into protected activity. See *United States v. Seeger*, 380 U.S. 163 (1965); *United States v. Ballard*, 322 U.S. 78 (1944). See also G. Stone, L. Seidman, C. Sunstein, and M. Tushnet, *Constitutional Law* 1369-73 (1986).

amendment protection where, as here, the activities promoted were lawful and the speech itself not inherently misleading; and that the ordinance would be measured against the four-part test announced by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980). That test provides that a government regulation will be upheld if it (1) regulates commercial speech; (2) promotes a substantial governmental interest; (3) directly advances that interest; and, (4) is not more extensive in its regulation of speech than is necessary to serve that interest. *Id.*

The court focused its analysis on the last part of that test. The court applied the Supreme Court's interpretation of the fourth part of the *Central Hudson* test in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). The *Fox* Court stated that a regulation is not more extensive than necessary when it is a reasonable fit between the ends directly advanced by the statute and the means chosen as embodied in the regulation. *Fox*, 492 U.S. at 480. The Court held that the government has the burden of proving the reasonableness of that fit. *Id.*

The district court's analysis led it to conclude that the city's ordinance did not constitute a reasonable fit between its asserted ends and the means chosen. The court held that a complete ban on newsracks distributing commercial speech violated the *Fox* test. Only 62 of the between 1,500 and 2,000 newsracks present on the city's streets belonged to the plaintiffs. Based on the city's concession that newsracks dispensing "non-commercial" papers caused the same problems as those distributing commercial papers, the court held that the regulation was an excessive means to accomplish the stated ends.



Cincinnati timely appealed the court's determination.<sup>5</sup>

## II

### A

Both parties agree on the legal contours within which this case must be decided. Both parties agree that this case requires the application of the four-part *Central Hudson* test, and that the interpretation given by the Supreme Court to the fourth part of that test in *Fox*. Both parties agree that this ordinance satisfies the first two parts of the test: in this case it regulates purely commercial speech,<sup>6</sup> and Cincinnati's interests in street safety and city aesthetics are substantial. As it is clear that the ordinance directly advances the purposes asserted, we have only one issue before us: Does Cincinnati's ordinance banning the distribution of commercial handbills along city streets and sidewalks prescribe a "reasonable fit" between the ends asserted and the means chosen to advance them? We hold that it does not.

<sup>5</sup> The plaintiffs have not cross-appealed from the court's judgment for the city on the due process claim.

<sup>6</sup> However, it should be noted that the ordinance can also be applied to "newspapers." All newspapers advertise products for sale, or direct attention to business establishments for the purpose of directly or indirectly promoting the sales thereof (restaurant or theater reviews), or direct attention to events of any kind for which an admission fee is charged for the purpose of private profit (Reds or Bengals games).

### B

In establishing the "reasonable fit" requirement, the Court in *Fox* attempted to draw a middle ground between greater and lesser review of a regulation of commercial speech. The Court expressly rejected imposing either a "least restrictive means" or a "rational basis" standard of review on regulations of commercial speech. *Fox*, 492 U.S. at 479-81. The Court rejected the least restrictive means approach as inconsistent with its prior commercial speech jurisprudence, and rejected the rational basis approach because "[t]here it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost." *Fox*, 492 U.S. at 480. The Court described its "reasonable fit" approach as one "that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served' . . . Here we require the government goal to be substantial, and the cost to be carefully calculated." *Id.* We presume that the cost referred to by the *Fox* Court is that which would accrue because of the burden placed on the commercial speech, and that the *Fox* test requires that such costs must be outweighed by the benefits of the asserted regulation. We can only make that calculation if we know what value the Court has placed on commercial speech, and it is to that consideration that we now turn.

### C

Commercial speech has unquestionably been protected by the first amendment since the Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), held that the



Court's prior offhand statement in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), that "purely commercial advertising" was not protected did not establish an exception to first amendment protection. The Court recognized in *Virginia Citizens* that commercial speech, though it may not touch upon the highest topics of human existence (indeed, much protected speech does not), is important to the public welfare. The Court noted in *Virginia Citizens* that speech uttered solely for economic motives has high value to those who listen to it. "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia Citizens*, 425 U.S. at 763. In recognizing the importance of commercial speech to private economic activity, the Court was once again affirming that the "right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge" is "essential to the orderly pursuit of happiness by free men." *Board of Regents of State College v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). The Court recognized that having made this decision, one with which we have no quarrel, commercial advertising is essential because it conveys information that permits each person to decide which trades and economic decisions are best for that person. See *Virginia Citizens*, 425 U.S. at 764. "Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal." *Id.* at

765. As such, commercial speech also has a high value to the society as well.

The Court did not mean to free commercial speech from all regulation and create some sort of an advertiser's paradise. The Court noted that time, place, and manner restrictions could be applied to commercial speech, provided that such restrictions are content-neutral. *Virginia Citizens*, 425 U.S. at 771. False and misleading speech could also be regulated or banned, *id.*, including types of commercial speech that may merely be likely to deceive the public. Also, speech proposing illegal commercial transactions may be banned. *Id.* at 772. As at least the prior regulation of speech considered potentially false or misleading would be impermissible if applied to political speech, the Court's decision effectively left commercial speech with lesser protection than that afforded to other types of speech. The Court has continued to adhere to these principles in its subsequent commercial speech jurisprudence. See *Central Hudson*, 447 U.S. at 563-64.

This "lesser protection" afforded commercial speech is crucial to Cincinnati's argument on appeal. Cincinnati argues that placing the entire burden of achieving its goal of safer streets and a more harmonious landscape on commercial speech is justified by this lesser protection. The city correctly notes that many courts have held that a city cannot ban newsracks containing traditional newspapers that comment on current affairs, thereby precluding it from alleviating its problem by completely banning newsracks from the city.<sup>7</sup> It asks us to hold that, in light

<sup>7</sup> See *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1196-97 (11th Cir. 1991), and cases cited therein.

of that restriction, its policy of banning only newsracks distributing commercial speech is a cost-effective way of alleviating its problem, and therefore meets the *Fox* test.<sup>8</sup>

The fact that commercial speech is owed less protection than is political speech does not lead to Cincinnati's conclusion that commercial speech has a low value in first amendment jurisprudence. "While [the plaintiff's] speech is primarily commercial in nature, and thereby not subject to all of the traditionally stringent protections of the first amendment, it is nevertheless entitled to substantial protections." *American Motors Sales Corporation v. Runke*, 708 F.2d 202, 208 (6th Cir. 1983). Our examination of that jurisprudence shows us that the lesser value placed on commercial speech only justifies regulations dealing with the content of the speech itself, or with distinctive effects that the content of the speech will

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<sup>8</sup> Cincinnati also argues that we should defer to the city's decision so long as it is reasonable. It draws this conclusion from two sentences in *Fox* that "we have been loath to second-guess the Government's judgment," *Fox*, 492 U.S. at 478, and that "[w]ithin those bounds [the reasonable fit test] we leave it to the governmental decisionmakers to judge what manner of regulation may best be employed." *Fox*, 492 U.S. at 480. We do not believe that these statements command us to give the city the benefit of the doubt in close cases, as Cincinnati would have it. Rather, they are meant to distinguish the Court's test in *Fox* from the least restrictive means test urged on the Court by the defendant. A least restrictive means test can be satisfied by only one method of regulation, while the *Fox* test can be satisfied by many different methods. If the Court's words mean what Cincinnati argues they do, then the *Fox* Court's subsequent rejection of the fourteenth amendment rational basis test would be a glaring inconsistency.

produce. In every commercial speech case but one,<sup>9</sup> a regulation upheld as constitutional by the Court fell into one of two groups. In the first, the regulation sought to ban speech believed to be inherently false or misleading.<sup>10</sup> In the second group, the regulation sought to

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<sup>9</sup> That one case is *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). In *Metromedia*, the Court overturned an ordinance that banned outdoor, off-site advertising displays as an attempt to increase traffic safety and enhance appearance. These interests are very similar to those advanced by Cincinnati in defense of its ordinance. The ordinance at issue in *Metromedia* is also the only regulation of commercial speech that has yet come before the Court where a government attempted to do what Cincinnati is trying so here, regulate a manner of conveying commercial speech in order to combat perceived evils wholly unrelated to the commercial content of that speech. Thus, if the majority of the Court had upheld San Diego's statute as a permissible regulation of commercial speech, we would be compelled to reverse the district court. However, only a plurality of the Court found that the San Diego ordinance constitutionally regulated commercial speech. The concurrence specifically – and vehemently – disagreed with that conclusion. See *Metromedia*, 453 U.S. at 536 (Brennan, J., concurring). The Court's judgment rested on the ground that San Diego's ordinance was an impermissible content-based restriction on non-commercial speech because it only permitted on-site signs with certain types of speech. *Metromedia* 453 U.S. at 521. As the Court has stated that "when no single rationale commands a majority, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds,'" *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 n.9 (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)), we do not view the plurality dicta in *Metromedia* as controlling the outcome of this case.

<sup>10</sup> See *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) (regulation banning

(Continued on following page)



alleviate distinctive adverse effects allegedly caused by and directly flowing from the type of commercial speech regulated.<sup>11</sup> It is clear that Cincinnati's ordinance does

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the use of illustrations in lawyer advertising and banning statements in such advertisements offering legal advice and information as misleading unconstitutional; regulation requiring disclosure that legal "fees" and "costs" are distinct financial obligations in retaining a lawyer to avoid misleading public constitutional); *Friedman v. Rogers*, 440 U.S. 1 (1979) (statute prohibiting the advertisement of optometry practices through trade names as misleading constitutional). The Court also ruled many regulations to be unconstitutional in this group. See *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 110 S. Ct. 2281 (1990) (regulation banning lawyer advertisement of certification by the National Board of Trial Advocacy as misleading unconstitutional); *In re R.M.J.*, 455 U.S. 191 (1982) (regulations limiting the precise names of practice areas lawyers can use in ads and identifying the jurisdictions lawyer is licensed in as misleading unconstitutional); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (regulation banning lawyer advertisement of prices for routine legal services as misleading unconstitutional).

<sup>11</sup> See *Posades De Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (statute banning advertising of casino gambling directed to Puerto Rico residents to prevent bad effects on morals of residents constitutional); *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (regulation banning in-person solicitation of accident victims for legal business because victims may be coerced into hiring lawyer constitutional); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (regulation setting different zoning regulations for pornographic theatres or bookstores to prevent neighborhood deterioration and crime increases constitutional). The Court has also declared many regulations to be unconstitutional that fall into this category. See *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466

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not attempt to regulate plaintiffs' speech because it is false or misleading. Therefore, plaintiffs' speech receives lesser first amendment protection only if Cincinnati's reason for regulating it falls into the second group of cases. We can best demonstrate what sort of rationale for regulation is included in the second group by listing a few examples.

In each case where the Court *upheld* a regulation on commercial speech that attempted to burden that speech because of perceived adverse effects on the community, those effects flowed naturally from personal actions fostered by the commercial content of the speech itself. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), Detroit passed a zoning ordinance requiring sexual entertainment establishments to be at least 1000 feet apart

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(1988) (regulation banning solicitation for legal business mailed on a personalized or targeted basis to prevent potential clients from feeling undue duress to hire the attorney unconstitutional); *Bolger, et al. v. Youngs Drug Product Corp.*, 463 U.S. 60 (1983) (statute banning unsolicited mailings advertising contraceptives to aid parental authority over teaching their children about birth control unconstitutional); *Central Hudson* (statute preventing promotional advertisement by electric utility to conserve energy unconstitutional); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (regulation banning advertisement of prices for routine legal services because of concern that legal professionalism will decline unconstitutional); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (regulation banning placement of "for sale" signs in the front lawns of houses in order to prevent the town from losing its integrated racial status unconstitutional); *Virginia Citizens* (statute banning price advertising by pharmacists because of concern that pharmacists' professionalism would decline unconstitutional).



from one another. The city believed that permitting such establishments to be closer would foster crime, prostitution, and neighborhood decay. However, the adverse effects of increased crime, prostitution, and neighborhood decay would allegedly occur because of the sort of person attracted to the location of these businesses. Also, in *Posados de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Commonwealth banned advertising of casino gambling that was directed at or detectable by Puerto Rican citizens. The reason given was that fostering gambling among Puerto Ricans would disrupt moral and cultural patterns, increase crime and prostitution, and foster organized crime and corruption. These problems, however, would all arise because Puerto Ricans would be more likely to frequent casinos and gamble if they were exposed to casino advertising. In each case, the adverse effect would occur as a direct result of persons acting upon the commercial content (availability of sexual entertainment, availability of casino gambling) of the speech regulated.

These observations destroy Cincinnati's argument in favor of its ordinance. The defense of that ordinance rests solely on the low value allegedly accorded to commercial speech in general. However, we observe that the Court actually accords a high value to commercial speech except in the two specific circumstances outlined above. Neither of them are present here. Cincinnati is not regulating the content of plaintiffs' publications. Neither is Cincinnati attempting to alleviate a harm caused by the content of the publications. Cincinnati is attempting to place a burden on a particular type of speech because of harms caused by the *manner* of delivering that speech.

"We review with special care regulations that entirely suppress commercial speech in order to pursue a non-speech related policy." *Central Hudson*, 447 U.S. at 566 n.9. Cincinnati's non-speech related policy does not survive that special review.

If commercial speech has a high value in the *Fox* calculus absent the two specific circumstances, then Cincinnati's ordinance cannot be a "reasonable fit." Plaintiffs will bear a very heavy burden by being completely deprived of access to the city streets. Discovery currently distributes 33% of its magazines through newsracks banned by the ordinance; Harmon, 15%. The benefit gained by the city, on the other hand, is miniscule. Plaintiffs own only 62 of the between 1,500 and 2,000 newsracks currently on city streets. As commercial speech has public and private benefits apart from the burdens directly placed on Discovery Network and Harmon, the burden placed on it by Cincinnati's ordinance cannot be justified by the paltry gains in safety and beauty achieved by the ordinance. While Cincinnati argues that this is the best option open to it in light of the protection afforded to newsracks dispensing traditional newspapers, "the First Amendment does not permit a ban on certain speech merely because it is more efficient" than other alternatives. *Shapero*, 486 U.S. at 473.

In contrast to Cincinnati's fears, it has many options open to it to control the perceived ill effects of newsracks apart from banning those dispensing commercial speech. To the extent that the use of chains to fasten the newsracks is unsafe, a regulation requiring that all newsracks be bolted to the sidewalk would solve the problem. To the

extent that aesthetics are a concern, a regulation establishing color and design limitations upon all newsracks would fit the bill. In fact, counsel for Cincinnati admitted at oral argument that it is currently working on an ordinance of this sort with representatives of traditional newspapers. To the extent that the number of newsracks is disturbing, the city can establish a maximum number of newsracks permitted on city sidewalks, and distribute them either through first-come, first-serve permit rationing or by selling permits to the highest bidder. We are confident that many more options exist for the city, so long as they do not treat newsracks differently according to the content of the publications inside.

### III

We also write briefly to explain why Cincinnati's ordinance does not pass constitutional muster on other grounds. The ordinance treats newsracks differently on the basis of the commercial content of the publications distributed. Cincinnati's ordinance, therefore, cannot qualify as a constitutional time, place, and manner restriction because it is not content-neutral. See *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981); *Rzadkowlowski v. Village of Lake Orion*, 845 F.2d 653 (6th Cir. 1988); *Wheeler v. Commissioner of Highways, Commonwealth of Kentucky*, 822 F.2d 586, 590 (6th Cir. 1987) ("the Billboard Act and regulations apply evenhandedly to commercial and non-commercial speech; they discriminate against no view or subject matter"). A content-neutral speech regulation is one "justified without reference to the content of the regulated speech," *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). Cincinnati's

argument on appeal, in contrast, relies on the lesser protection allegedly accorded to commercial speech.<sup>12</sup>

Cincinnati could argue that its ordinance is content-neutral because it was not "adopted . . . because of disagreement with the message [the regulated speech]

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<sup>12</sup> Nor does Cincinnati's ordinance qualify as content-neutral under the "secondary effects" doctrine promulgated by the Court in *Playtime Theatres*. There, the city enacted a zoning ordinance keeping sexual entertainment movie theaters 1,000 feet apart from a residential zone, church, or park, and one mile from any school. The Court in *Playtime Theatres* stated that the ordinance was content-neutral, and therefore reviewable under the time, place, and manner regulation standard, because the primary concern of the city in enacting the ordinance was to control the secondary effects caused by the theaters. *Playtime Theaters*, 475 U.S. at 48. While Cincinnati is attempting to control effects on the city's landscape and fixtures, these effects are neither secondary nor caused by the speech being regulated. In *Playtime Theaters*, the effects – increased crime and decreased neighborhood quality, among others – were secondary to the primary effect of the theaters; the dissemination of sexually explicit entertainment. Here, the very existence of different types of newsracks causes aesthetic problems for the city. Additionally, in *Playtime Theaters*, the effects were caused by the nature of the speech disseminated in the theaters. Here, the effects newsracks may have on the city's aesthetic and safety interests are the same for all newsracks, whether the publications inside are commercial or non-commercial speech.

Had Cincinnati produced evidence that the types of newsracks distributing commercial speech caused effects distinct from newsracks distributing newspapers, such as the clogging of downtown streets caused by auto buffs crowding around to obtain the latest issue of *Auto World*, the ordinance may have been constitutional under the secondary effects doctrine. This, however, is not the case.



conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Cincinnati could argue that its enforcement of the ordinance is directed solely at the aesthetic and safety problems caused by newsracks, and therefore is not a content-based decision. However, we cannot accept that argument for two reasons. First, Cincinnati's position is based on the argument that it can treat newsracks distributing commercial speech differently than those distributing commentary on public affairs. Given the wide range of options open to the city to control the perceived ill effects of newsracks without completely banning those distributing commercial speech, we find it hard to believe that the city does not in fact favor the distribution of newspapers such as the *Cincinnati Post* and the *Cincinnati Enquirer* on its street corners over that of *Home Magazine*. The failure of the city to even include representatives of plaintiffs – and other publishers of commercial publications – in its ongoing discussions with newspaper representatives regarding aesthetic and safety regulations governing newsrack appearance and fastening provides further proof of an unadmitted bias against commercial speech.<sup>13</sup> Second, Cincinnati's hypothetical argument

<sup>13</sup> The Architect's testimony is illuminating on this point.

Q: Does the City have means to deal with the proliferation of non commercial publishers who are seeking City permits?

A: The City is attempting to work cooperatively with the non commercial publishers to place the devices in an orderly manner and in some cases to agree to certain standard devices, particularly in the center business district.

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only addresses the enforcement of the ordinance. The ordinance itself was on the books long before this problem supposedly arose. There is no argument advanced that the ordinance's ban on distribution of commercial handbills, by any method, not merely by newsracks, was not directed against commercial speech based on its content.<sup>14</sup>

Nor can the ordinance pass muster as a valid content-based restriction. "Content based restrictions 'will be upheld only if narrowly drawn to accomplish a compelling governmental interest.'" *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2474 (White, J., dissenting) (quoting *Sable Communications of Cal., Inc. v. Federal Communications Comm'n*, 492 U.S. 115, 126 (1989)). This standard has been

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Q: Can't those very same regulations be applied to commercial publishers?

A: They could if commercial publications were considered legal.

<sup>14</sup> Cincinnati's ordinance would not pass muster even if it met the requirement that it be content-neutral. The second part of the time, place, and manner standard is that the regulation be "narrowly tailored to serve a significant governmental interest." *Rock Against Racism*, 491 U.S. at 796 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The ordinance is not narrowly tailored because there are many options available to the city that would address its aesthetic, safety, and proliferation concerns without placing the significant burden on commercial speech that the ordinance does. See *supra*, at pp. 12-13. None of these options would be less effective in promoting the asserted interests than is the complete ban on distribution of commercial handbills. See *Rock Against Racism*, 491 U.S. at 799-800.



interpreted to require a government to choose the least restrictive means to further the governmental interest. *Sable Communications*, 492 U.S. at 126. The ordinance is clearly not the least restrictive means, as it places a substantially greater burden on commercial speech than is necessary to alleviate the city's aesthetic and safety concerns.

#### IV

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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#### [p. 50] THOMAS E. YOUNG DEPOSITION

location in which four dispensing devices are distributing commercial and two non commercial? What's the difference aesthetically or safety?

A. I don't see that there is an aesthetics difference between that specific comparison. In addition to dealing with the proliferation though, and the numbers of devices of these specific commercial publications, is the always present near certainty of proliferation.

Q. You use the word proliferation and you have been using it repeatedly. What do you mean by proliferation?

A. More and more companies choosing to distribute commercial handbills.

Q. You've been involved now as City Engineer with this permit system for approximately five years?

A. Yes.

Q. In those five years, how many publishers who wished to dispense, again for purposes of this deposition we'll call them commercial publications, have applied for permits?

A. We've indicated that there have been four and I should point out that all of those have occurred within essentially the last two years. A total [p. 51] of four, of that total of five.

Q. Do you know what the total number of machines are that were put out on the City right-of-way by these four publishers?

A. We have the information that they have supplied on their applications. I don't personally remember the numbers, no.

Q. Do you have any idea of what percentage of total number of newsracks are on the streets?

A. It's a relatively small percentage.

Q. Do you anticipate a greater number of newsracks out on the street by commercial publishers?

A. Yes.

Q. What makes you anticipate that?

MR. GANULIN: You mean were the City ordinance prohibiting it to be disallowed by the Court?

Q. Assuming the clarification from Mr. Johnson had not come out in February of 1990, would you then have anticipated a greater number of permit applications by commercial publishers?

A. Yes. And my original answer was based on that assumption, that that was the question that you asked.

Q. And that assumption was based on the fact you had four in the last two years?

[p. 52] A. Yes.

Q. Have you had a proliferation in the number of applications by non commercial publishers?

A. Yes.

Q. And can you give me an idea over the last couple years how many or what the rate of increase has been for non commercial publishers?

A. I don't have that, very obviously, figures without going in detail into the application forms but it was not very long ago that the Cincinnati Post and the Cincinnati Enquirer were the only ones with dispensing devices on the City streets. And the others have all come in within a relatively short period of time in terms of the life of the City.

Q. Does the City have means to deal with the proliferation of non commercial publishers who are seeking City permits?

A. The City is attempting to work cooperatively with the non commercial publishers to place the devices in an orderly manner and in some cases to agree to certain standard devices, particularly in the center business district.

Q. Can't those very same regulations be applied to commercial publishers?

A. They could if commercial publications [p. 53] were considered legal.

Q. Assuming that they were, again for purposes of this deposition, is there any reason why the City could not apply the same regulations and controls to commercial publishers as it could to non commercial publishers?

A. No.

Q. Is there any reason why the City's aesthetics and the City's safety concerns couldn't be protected and advanced by regulatory controls uniformly applied to both commercial and non commercial publishers as relates to newsracks?

MR. YURICK: Objection to that question but you can go ahead and answer if you can.

A. I would like you to restate that. (Whereupon, the pending question was read by the court reporter.)

MR. GANULIN: Is the number of boxes the same in your question? In other words, is he comparing just commercial just noncommercial boxes to the same number of mixed non commercial and commercial? Are you asking him if the aesthetics and safety concerns could be figured in with the addition of commercial boxes?

MR. MEZIBOV: I'm asking Mr. Young if the City's concerns for aesthetics and safety could not

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#### TRIAL TESTIMONY

ROBERT H. RICHARDSON

[p. 8] A. I'm principle architect for the City, right.

Q. And as -

THE COURT: Ruben Cohen resigned or retired?

THE WITNESS: He has, yes, several years ago.

THE COURT: Thank you.

Q. As City Architect, Mr. Richardson, you're concerned with the architecture, esthetics and safety as relates to public areas and public buildings in the City?

A. Yes, sir.

Q. And this would include the City right-of-ways; is that correct?

A. Yes.

Q. I do understand correctly as City Architect it's your responsibility to coordinate the various City agencies which have some impact on the public environment?

A. We work in conjunction with all the divisions of Public Works to do that, yes.

Q. And it's correct, is it not, Mr. Richardson, that at present - that at present nor in the past several years has the City adopted formally any rules, regulations, or policies governing esthetics with respect to structures located on the public right-of-way?

A. They have attempted to develop standards starting in 1979, but none of which have been accepted into law at this point.

Q. So if I went to the City code book, I would not find any [p. 9] laws which would govern -

A. You would find -

Q. - esthetics?

A. You would find Regulation 38, whatever that says.

Q. And you're not aware then, are you, at this time, Mr. Richardson, of any newsracks whether they distribute commercial or non-commercial publications which are in violation of any particular City law, rule or policy regarding either esthetics or safety?

MR. YURICK: I'm sorry; I'm going to object.

THE COURT: I'll sustain the objection. I think that you understand the question, what he's asking you.



THE WITNESS: Yes, sir.

THE COURT: Well, I think he's drawing a distinction between laws that have been enacted and rules and regulations which may or may not have been enacted by the City Council but have been some media put out by the City Manager, and I think he wants you to draw a distinction, so go down the list. Are there any laws? Start out with that.

Q. Mr. Richardson, is it correct there are no laws - and by "laws" we're talking about regulations which have been enacted by the City Council and made part of the City - Cincinnati Municipal Code - which govern esthetics on the public right-of-way as relates to structures placed on the City right-of-way?

[p.10] MR. YURICK: -Your Honor, I'm going to object to the question. I'm not -

THE COURT: What's the basis for your objection?

MR. YURICK: Actually there are two bases. For one basis, I think that the Court can take judicial notice of the laws that are in the Municipal Code and I think those have been pointed out to the Court in the trial brief and, No. 2, I don't believe Mr. Richardson has been qualified or sufficient foundation has been laid -

THE COURT: He is the City Architect and he has to make decisions concerning these matters, so I think he would certainly know what the laws and regulations are if that is his principle occupation. I'm going to overrule since this is particularly - it is a non-jury trial. I think I can weigh the evidence and determine that.

MR. YURICK: Thank you, Your Honor.

THE COURT: Overruled. Now he is asking you concerning any laws regarding governing esthetics and right-of-ways.

THE WITNESS: The existing laws are simply what is in the Municipal Code, and I think it's Chapter 718 and also Administrative Regulation 38 which is an administrative regulation of the City Manager.

THE COURT: What's Chapter 718?

THE WITNESS: It's dealing with the use of the public [p. 11] right-of-way and revocable street privileges in the Municipal Code.

Q. Does that Code 718 in any way relate to esthetics?

A. It relates to placement of these devices, or what-not, and use of the public right-of-way that may or may not relate to esthetics.

Q. You used the term "718." Is it 911 that you're referring to?

A. I don't know the exact section of it.

Q. I'm going to ask you to look at the exhibit book.

MR. MEZIBOV: If I might, Your Honor.

THE COURT: You may. Would you hand -

MR. MEZIBOV: Ms. Schaeffer will hand you a copy of that. (Clerk complying.)

Q. I'm going to ask you to look at Exhibit No. 1.

A. Is that marked A-3?

Q. It's also A-3. That was a deposition exhibit.

THE COURT: It should have a tab on it -

THE WITNESS: Yes.

THE COURT: - down at Plaintiffs, Exhibit 1.

Q. Is that Amended Regulation 38?

A. Yes, sir.

Q. Now is that amended regulation part of the City Municipal Code?

[p. 12] A. Regulations are regulations by the City Manager, City of Cincinnati. They are not directly part of the Municipal Code, no.

Q. Now, does Amended Regulation 38 pertain to newsracks on the City right-of-way?

A. Yes, sir.

Q. Does it in any way govern esthetics concerns as relates to those newsracks?

A. No.

Q. Does it in any way relate to safety concerns as relates to newsracks?

A. Yes.

Q. In what way?

A. It basically addresses the ability of placing them in the right-of-way and in a position that would not interfere with safety in terms of handicap or crosswalks

or fire or police or whatever, parking, that kind of thing. But for the most part, it allows the individual to place them within the right-of-way and remove them if someone requests that there is a problem about them. There is no specific language.

Q. Are there any other rules or policies which have not been enacted into law which to your knowledge govern newsracks on the City right-of-way?

A. Which have not been enacted?

Q. Correct.

[p. 13] A. There is currently a draft set of guidelines that the various City agencies and newspaper companies have been working on for the Downtown, and at this point in time several streets have already been implemented in terms of a -

THE COURT: Well, now you say this is something that is being reviewed by the City departments?

THE WITNESS: Yes, sir.

THE COURT: Is it something that's been promulgated and published as being in the course of action the City is going to follow or is the City still studying the problem?

THE WITNESS: The newspaper companies collectively decided to file it on their own. They are implementing the plan. It has not been approved by the City Council or City Manager at this point.

Q. Now, in reference to that particular piece of proposed legislation, I'm going to ask you to turn to Trial

Exhibit No. 3 in that booklet. Do you have that in front of you?

A. Yes.

Q. Is that the proposed regulation you've just made reference to?

A. Yes, sir.

Q. Now, this has a date in the upper right-hand corner of June 14th, 1990; is that right?

A. Yes, sir.

Q. To your knowledge, is this proposed regulation to be [p. 14] enacted into law?

A. That is the intention. At this point in time there is a disagreement on, I think, three separate guidelines that are within this document with the various newspaper companies, so it has not been enacted into law at this time.

Q. You say there is a disagreement between the City and certain news publishers with respect to the provisions -

A. I think there are three guidelines. Three of the fifteen there is a disagreement on, yes.

Q. Which of the three is there a disagreement on?

A. No. 2, No. 9, and No. 15.

Q. With respect to No. 2, what does that govern?

A. It governs the specifics of where you can place a newsrack within the right-of-way, whether it can be in front of a crosswalk or handicap ramp or bus stop.

Q. What is the nature of the disagreement with the news publishers as you understand it?

A. They agree in concept, but feel if it is written down, it's too specific, that someone could interpret the fact that it cannot be in a bus stop, that it cannot be in any bus stop at any time or within a parking space or fire hydrant. They agree not to place it within these areas but they at this point have not agreed that -

THE COURT: How do you define a bus stop as a for instance?

[p. 15] THE WITNESS: I think that is one of the issues.

THE COURT: Is a bus stop the 30 or 40 feet from the place where the bus stop is, on a telephone pole or something or other -

THE WITNESS: Yes.

THE COURT: - along the curb?

THE WITNESS: The bus stop is marked in the beginning by an orange stripe on the pole.

THE COURT: Excuse me. Stopping right there, would they be permitted to, under this proposal here, to mount these, say, just downstream as opposed to upstream? You know what I'm talking about, upstream and downstream?

THE WITNESS: Yes, sir. There is also an area that is marked on a bus stop on a traffic pole.

THE COURT: On either side of the poles they can put them?



THE WITNESS: On either side they could put them, right.

Q. You indicated the City is negotiating with certain parties with respect to these terms; is that correct?

A. Yes, sir.

Q. Those parties consist of *The Cincinnati Enquirer*, *The Cincinnati Post*; is that correct?

A. That's two of them. There are several others involved also.

[p. 16] Q. Who are those others?

A. *USA Today*, *Wall Street Journal*, *New York Times*, *The Courier Journal*, *The News Record* and *Business Courier*. I think that is all.

Q. These are all publishers who currently have newsracks out and about the City right-of-way?

A. Yes, sir.

Q. Is it accurate that Harmon Publishing has not been privy to these conversations?

A. That's correct.

Q. Is it accurate that Discovery Center has not been privy to these conversations?

A. Yes.

Q. And they are not privy because the City does not want to include them in the discussions?

MR. YURICK: Objection.

THE COURT: Who are the two you mentioned?

MR. MEZIBOV: Discovery Center and Harmon Publishing, Your Honor.

THE COURT: Why weren't they included? Overruled.

THE WITNESS: At this point in time, legally we were relying on the Solicitor's Office determining who should be in the right-of-way. We were simply meeting with the publishers that were deemed to be appropriate newsracks in the public right-of-way.

[p. 17] THE COURT: Let's get down to brass tacks. If Harmony (sic) and Discovery used the exact same newsrack as these others and they were painted in the same color or whatever you esthetically think is the appropriate color for the City of Cincinnati, would you have any objection to them?

THE WITNESS: From an esthetic standpoint, if all the boxes were the same, no; but I'm not speaking for the legal aspect -

THE COURT: I'm asking you. You're the person who makes the choice esthetically.

THE WITNESS: In terms of what it looks like, yes.

THE COURT: So if they use the same exact box or same appearing - how - why would the City object? You're the one - I guess you and the traffic engineer - objecting because it might be cluttering up the City. But cluttering up the City is not what's in the boxes.

THE WITNESS: If they are allowed to be there, I guess others were allowed to be there in terms of commercial handbills, of which the City Manager is involved in defining.

THE COURT: Is it the quantity of the boxes you're objecting to, or is it the appearance of the boxes? The newspaper boxes are perfectly all right but the other boxes are garish or something; you don't like the appearance of them?

THE WITNESS: At this point we're not objecting to quantity. Although, if boxes that are deemed -

[p. 18] THE COURT: If you're not objecting to the quantity and you're not and if the appearance all remains the same, what is the objection?

THE WITNESS: I think the objection is if the quantity could be an issue, if these -

THE COURT: It isn't an issue yet; is it?

THE WITNESS: Not with the ones we're working with.

THE COURT: And if it became an issue, how would you determine whose boxes would be there and whose wouldn't? Would it be based on the content?

THE WITNESS: At this time it is determined by the City Engineer working with the existing laws; that we not do not determine who goes there and who does not. We are simply involved in organizing what is there.

THE COURT: What we're trying to find out from your point of view, your position, is that if the boxes

are all identical in appearance, you aren't really heavy on color; are you?

THE WITNESS: We initially -

THE COURT: I think some of them have yellow -

THE WITNESS: We initially started out to have them all the same.

THE COURT: *The Enquirer* is yellow and *The Post* is red and *USA Today* is blue and white.

THE WITNESS: Right.

[p. 19] THE COURT: What other primary color is there? Red, yellow and blue.

THE WITNESS: That's pretty much all of them.

THE COURT: A lot of them in between?

THE WITNESS: Yeah.

THE COURT: If they are all the same size boxes, same in appearance substantially and they were in the colors of the rainbow, you wouldn't have any objection; would you?

THE WITNESS: With the exception of the fact if it's deemed that commercial handbills are legal, then there might be a lot of other ones out in the right-of-way; anything from Kroger bulletins to Pepsi -

THE COURT: There is nothing illegal about commercial handbills are there, in your view?

THE WITNESS: No, not within the framework of the law.

THE COURT: So from your point of view you have no objection to -

THE WITNESS: No.

THE COURT: - the boxes -

THE WITNESS: With the exception -

THE COURT: - as long as they are uniform in appearance. And even you don't have any objection because they have different colors?

THE WITNESS: No. But the issue being, if other ones [p. 20] are allowed that have advertising in them, the numbers could become a significant problem.

THE COURT: That becomes a different problem. That is not the question before the Court.

THE WITNESS: For the ones we're working with right now, I have no objection.

THE COURT: Including Discovery and Harmony (sic)?

THE WITNESS: It is not included in the group we're working with, oh, no.

THE COURT: That is what the case is about. What's wrong with Discovery and Harmony [sic] boxes?

THE WITNESS: We have not dealt with those at all based on this draft regulation. There is nothing wrong with them.

THE COURT: Okay.

Q. Mr. Richardson, you're certainly not aware that news boxes used by Harmon or by Discovery have

caused any problems on the right-of-way insofar as safety is concerned; are you?

A. No, I'm not, but they do - they have a different appearance than a lot of the other ones as we know them. No.

Q. And what your proposed regulation would seek to do is impose some uniformity on the style and appearance and size and shape of the various news boxes; is that correct?

A. Yes, sir.

Q. So if Harmon and Discovery Center would agree to utilize [p. 21] whatever news box the City deems to be an appropriate structure on the City right-of-way, that would obviate any problem you would have with Harmon's or Discovery Center's newsrack; would it not?

A. Yes, sir, with the exception of the number question could become an issue if many other ones are allowed to be there.

Q. Wouldn't numbers become a question if purely non-commercial publishers came in and, in droves, and wanted to put their papers in the public right-of-way?

A. Yes, it could.

Q. And wouldn't the City attempt to regulate the incursion of all the other non-commercial publications with regulations such as your proposed administrative regulation?

A. I suppose they would -



THE COURT: I guess what that question means is, it doesn't make any difference what's in those boxes; you just want to limit the number of boxes. And suppose a lot more newspapers around the country decided they wanted to sell in Cincinnati, how would you draw the line?

THE WITNESS: At this point we haven't. What we tried to do is limit the amount in a row in the space, for instance, the first light pole, so there is space to walk around. We have not limited the number.

THE COURT: Go ahead.

Q. And that is what you intend to do in the future with your [p. 22] proposed regulation; is that correct?

A. Yes, sir.

Q. To your knowledge, has Discovery or Harmon attempted to work with the City insofar as meeting whatever questions or problems the City has with regard to their newsrack?

A. Again, the Engineering Division deals with the permits directly. As far as I'm concerned, yes; but I don't have direct dealings with them.

Q. And it's accurate, is it not, Mr. Richardson, that whenever the City has had a problem with any particular newsrack because of its location, perhaps what the City would do would call up the publisher and ask that publisher to move that newsrack or adjust it in such a fashion to meet that complaint?

A. Yes, sir, but I think the City Engineer could speak to that better. They don't particularly have the

manpower to check every location, newspaper boxes in the whole city. But that is basically correct.

Q. That is how newsracks have been regulated in terms of a problem?

A. If there is a problem, they move it.

Q. You have already complied with the complaints?

A. The few, but I don't deal with that day to day.

THE COURT: Your colloquy here's to the effect the newsracks are really regulated by the City Engineer -

[p. 23] THE WITNESS: Yes.

THE COURT: - if somebody is not happy?

THE WITNESS: It is the technical resources of the City Engineer's office.

THE COURT: Thank you.

MR. MEZIBOV: Your Honor, that is all the questions I have of Mr. Richardson along with the introduction of his -

THE COURT: Do you have any redirect? Would you like to ask the witness on the matters that have been brought up on cross?

MR. YURICK: I think so.

THE COURT: Go ahead.

MR. YURICK: I would interpret - I guess it would be up to the Court to say whether or not their -

THE COURT: Go ahead with your questioning. It's all right. I don't I think it is fair for you to present

your case in Mr. Mezibov's case, but I'll permit you for the purpose of testing his testimony to examine him on redirect.

MR. YURICK: Okay.

THE COURT: Go ahead.

#### REDIRECT EXAMINATION

BY MR. YURICK:

Q. Mr. Richardson, you testified that there were - there was no difference between the possible dangers posed by the Harmon and the Discovery Center boxes as opposed to ordinary news [p. 24] boxes or paper - or boxes which dispense newspapers; is that correct?

A. There is no difference in the nature - our office was not dealing with which paper was in the boxes. We were simply dealing with the type of dispenser. We do not deal with specifics of the type of dispenser of Harmon or Discovery with this process because they were not part of it. There is a difference if you want to physically look at the boxes. Certainly the Harmon Homes is plastic and the Discovery Center is a slightly different design, it's on a pedestal and slopes differently than the others and has, I think, the area where you reach your hand in or whatever sticks out to the right side differently than the others.

THE COURT: Is there any esthetic objection to the Discovery Center's boxes as contrasted or compared to those of the newspapers? You don't find any objection to those; do you?

THE WITNESS: Again, I never dealt with them individually. We just wanted Harmon's to use one particular box.

THE COURT: If they agree to use the same box, would you have any problem with that?

THE WITNESS: Not from the physical box standpoint, no.

THE COURT: That is all you're interested in?

THE WITNESS: That is all I deal with.

[p. 25] Q. Sir, but do these boxes, do all of these dispensing devices, do all of them pose esthetic problems?

A. Collectively, yes, they are all different.

THE COURT: Let me ask a question now. We're getting into another area. Is this a matter for the Court, as to whether difference is esthetically not good in this community as opposed to having everything the same?

MR. YURICK: Well, Your Honor, if the question is directed to me, I think Mr. Richardson is going to testify and the Court can make a finding that there are problems with all of these sorts of newspaper boxes.

THE COURT: Does the Building Department dictate that buildings have to all appear alike that appear in the city?

MR. YURICK: I think that there are architectural -

THE WITNESS: There's some safety issues. The main one being, they are attached to the City light poles

by chains and each one of the boxes having a different design is now attached in a slightly different manner and, of course, it's causing rust on the City light poles which is one of the main issues: to get the chains off the city light poles. By using a box of a similar design you can attach it to the City sidewalk and be in similar concept. If you have eleven or twelve different ones, you have to have a different concept for each different box.

THE COURT: There are some safety -

[p. 26] THE WITNESS: Right.

THE COURT: - architectural reasons, just not esthetics?

THE WITNESS: Right.

THE COURT: But if Discovery and Harmon, the plaintiffs in the case, used the same boxes as newspapers, that you would approve? You wouldn't have a problem with them; would you?

THE WITNESS: Presumably from an esthetic standpoint, no.

MR. YURICK: I would have no further questions. I would just like the right - to reserve the right to call Mr. Richardson in my case.

THE COURT: Yes.

MR. MEZIBOV: Your Honor, may I ask a couple of followup questions?

THE COURT: Go ahead.

MR. MEZIBOV: Your Honor, I would ask that Mr. Richardson be handed a package of photographs which is Exhibit 33.

(Clerk handing the exhibits to the witness.)

#### RECROSS-EXAMINATION

BY MR. MEZIBOV:

Q. Mr. Richardson, I'm going to ask that you open that, please, and you should find a number of photographs. On the [p. 27] back would be the number of the particular photograph. And I'm going to ask you to find photograph No. 33D.

THE COURT: Let me ask this question. Is it the position of counsel that all the exhibits that are being identified should be admitted in evidence so we don't have to identify and offer?

MR. YURICK: Yes, Your Honor.

THE COURT: You have any objection to the Plaintiffs' Exhibits?

MR. YURICK: No, I have no objection.

THE COURT: Do you have any objection to the defendant's?

MR. MEZIBOV: No.

THE COURT: For the record, all the exhibits that are introduced are admitted, and when you get to an exhibit number, consider that's admitted.

(Plaintiffs' and Defendant's exhibits were admitted.)



Q. Mr. Richardson, do you have in front of you photograph No. 33D?

A. Yes, I do.

Q. I'm going to ask you what that particular photograph depicts?

A. It shows three newspaper boxes attached to a City mall pole which is a tripod pole with three separates [sic] poles making up the base. It is *The Enquirer, USA Today* and a *Business* [p. 28] *Courier*.

Q. Just so the record is clear, Harmon's news box is not in that photograph?

A. No.

Q. Discovery Center's news box is not in that photograph?

A. No.

Q. Earlier you indicated to Judge Spiegel the City was concerned about the manner in which certain news boxes were attached to light poles?

A. Yes, sir.

Q. And that that in some way posed a safety concern?

A. Yes.

Q. And it also posed, I suppose, an esthetic concern because of the rust that was built up on the poles?

A. Yes, sir.

Q. Is this an example of that type of problem?

A. Yes, it is.

Q. Then this is a problem that in no way involves either Discovery Center or Harmon's news boxes; does it?

A. It involves all the news boxes.

Q. Now I'm going to ask you to look at Exhibit 33F, please.

THE COURT: Can I take a look at that one you just looked at?

THE WITNESS: Sure.

THE COURT: Thank you, sir.

\* \* \*

[p. 32] A. I suppose based on the administrative Regulation 38 it is currently allowed to be there. As far as our draft guidelines, no, it is not.

Q. Because it is too large?

A. It's much higher than the other boxes.

MR. MEZIBOV: That's all the questions I have, Your Honor.

THE COURT: Can I take a look at those, please?

MR. YURICK: Your Honor, just a couple questions.

THE COURT: Yes, certainly.

## FURTHER REDIRECT EXAMINATION

BY MR. YURICK:

Q. Mr. Richardson, could you please take out picture number – or Exhibit 33B.

MR. MEZIBOV: B?

MR. YURICK: B as in boy.

THE COURT: Good for you. Phonetically. That is the only way I can get them straight.

A. I have got it.

Q. And can you describe what that depicts?

A. It is an older City light pole with a bus stop and an *Enquirer, Post* and a Discovery Center box attached to it next to a handicap ramp.

Q. And those are chained?

A. Chained to the pole, right.

[p. 33] Q. Does it appear there is rust in two spots where the chains are rubbing against the pole?

A. Yes.

Q. And 33C as in cat, could you describe what that depicts, please?

A. It's a newer City light pole with three boxes attached to it, one is *Harmon Homes*, one is *The Business Courier* and one is *The Post*, again attached by cable or chain.

Q. And I think it was your testimony earlier that these are part of the esthetic concerns of your office; that

these dispensers, when they are attached to poles like this, cause damage to the poles?

A. Yes, sir. They also, by being attached to the poles, are typically right next to the intersection which is another concern because they block the pedestrian circulation and flow of Downtown streets.

Q. And possibly visibility also?

A. Right.

MR. YURICK: No further questions at this time.

THE COURT: Let me take a look at those pictures, too.

THE WITNESS: Sure.

(The Court reviewing the photographs.)

THE COURT: All right. So your real concerns are the methods of attachment, that they can cause damage to the poles, [p. 34] the lack of uniformity, which really gets into the question of size, I presume, and the fact they may be blocking?

THE WITNESS: And the location of them.

THE COURT: The location.

THE WITNESS: They don't block safety and health issues and they don't block crosswalks.

THE COURT: Crosswalks.

THE WITNESS: And bus stops.

THE COURT: At intersections. And I guess the fourth one would be the quantity of them could create problems?

THE WITNESS: If too many -

THE COURT: There must be some way of regulating them. If the one newspaper is on this corner, there are four corners to every intersection -

THE WITNESS: Right.

THE COURT: - maybe someone wants the prime intersection but you can't get the northeast, you might have to take the southwest?

THE WITNESS: Yes.

THE COURT: So the quantity could be regulated and they could be of a uniform size or regulated. That would satisfy all your needs?

THE WITNESS: Yes, sir.

THE COURT: Okay. Thank you.

MR. MEZIBOV: Your Honor, I have one more question [p. 35] and one photograph just to clarify those last two questions.

THE COURT: Go ahead.

#### FURTHER RECROSS-EXAMINATION

BY MR. MEZIBOV:

Q. Mr. Richardson, again I'm going to ask you to look at the photographs, this time 33G.

A. Yes.

Q. And could you tell us what that photograph depicts?

A. It's a photograph of six new boxes in a row. I think it's on 4th Street across from Gidding Jenny.

THE COURT: This is 33 -

MR. MEZIBOV: G.

THE WITNESS: G.

THE COURT: Okay.

A. Five of the same type, and *USA Today* is different.

Q. Now, this particular photograph depicts news boxes which have been lined up in a row so as not to require the chaining of any news box to a pole; is that correct?

A. Yes, sir, they are attached to the sidewalk by bolt.

Q. It would be correct to say this satisfies the City's concern with regard to safety and esthetics -

A. Yes, sir.

Q. - in answer to questions of news boxes being close to handicap ramps or tied to poles?

A. Yes, sir. This is set away from the intersection enough [p. 36] that it allows enough space to walk from the corner and is placed in a place that is not in front of a bus stop or a front door or loading zone.

Q. And is there any reason you know of why Discovery Center and Harmon's news boxes could not be similarly aligned?

A. In this particular case, the guidelines call for a maximum of six in a row which this happens to have; so



no matter which it would be, it shouldn't be in a row. But there may be a place down the street that would work out just as well.

Q. So in this photograph 33G, if *The Louisville Courier* wanted to place its news box there, it could not; is that correct?

A. Right.

Q. It would have to go to another location?

A. Right.

Q. And then the City, therefore, can control the number of news boxes at a given location?

A. At a given location, yes.

Q. Regardless of the contents of the information dispensed from the news boxes?

A. That's correct.

MR. MEZIBOV: That's all the questions I have, Your Honor.

MR. YURICK: I have no questions.

THE COURT: I'll take a look at that one, too. Thank [p. 37] you, Mr. Richardson.

THE WITNESS: Thank you.

(Witness excused.)

THE COURT: Okay. You may call your next witness.

MR. MEZIBOV: If the Court please, we would call Tom Young as if on cross-examination.

THE CLERK: Will you raise your right hand?  
(Duly sworn by the Clerk.)

THE COURT: Would you state your full name, please, and spell your last name for the court reporter?

THE WITNESS: Thomas E. Young; Y-o-u-n-g.

THE COURT: Have to keep your voice up so we can all hear you.

THE WITNESS: Yes, sir.

THOMAS E. YOUNG

a witness herein, having previously been sworn, was called as if upon cross-examination and testified as follows:

#### CROSS-EXAMINATION

BY MR. MEZIBOV:

Q. Mr. Young, it's correct, is it not, that you are the City Engineer for the City of Cincinnati?

A. That's correct.

Q. And do I understand correctly that in your capacity as City Engineer you have some responsibility to receive and review and make recommendations with regard to applications for [p. 38] the use of newsracks on the City right-of-way?

A. That is correct.

THE COURT: And you use a microphone, too. Pull it around to the side, if you will. There is a place

there you can loosen it to raise it up. Receive, review and make recommendations as to locations; is that right?

THE WITNESS: Yes.

THE COURT: Who decides ultimately where a box goes?

THE WITNESS: My office does not make suggestions as to where the boxes should go. We review applications for placement.

THE COURT: And if somebody – if there are six there already, you would say, "No, you can't put it there?"

THE WITNESS: We would recommend against it, yes.

THE COURT: Who would you recommend to? Who makes the decision, the City Manager?

THE WITNESS: We are – my office is the designee under the City Manager form of Government.

THE COURT: So everything that all the subordinates do is recommendations and everything goes out under the City Manager or over the City Manager's signature?

THE WITNESS: No, sir. Our office issues or denies or revokes permits.

THE COURT: Okay. Then you would be granting or denying the permit?

[p. 39] THE WITNESS: But obviously we could be overruled by the City Manager.

THE COURT: Oh, sure.

Q. Now –

THE COURT: When you say you make recommendations, you actually are the one that grants or denies the permit?

THE WITNESS: That's correct.

Q. Mr. Young, prior to 1990, is it correct that your recommendations with regard to newsrack permits were governed by Amended Regulation 38 and applicable City code provisions; is that correct?

A. That's correct.

Q. And there were no other written guidelines which would assist you in utilizing either the regulations or the ordinances when you made your decisions to grant or revoke applications?

A. That's correct.

Q. Now, at some point in 1989 you received an application from Harmon Publishing; did you not?

A. Yes.

Q. I'm going to ask you to look at Exhibit 9, please, in the exhibit book.

THE COURT: Turn to Tab 9.

A. Yes, sir.

Q. Do you have that in front of you?

[p. 40] A. Yes, I do.

Q. This is a letter from you to Harmon Publishing; is it not?

A. Yes.

Q. Dated July 21st, 1989?

A. Yes.

Q. And at this point you indicated that you were granting permission to Harmon to place its publications in newsracks on the City right-of-way?

A. Yes.

Q. And you were familiar at that time, were you not, with the nature and character of the publication which Harmon proposed to distribute through newsracks?

A. Yes.

Q. And you felt that at that time there was no grounds to refuse them their request for newsrack permit; is that correct?

A. That's correct.

Q. I'm also going to ask you to turn to Exhibit Number 15.

THE COURT: Fifteen?

MR. MEZIBOV: Fifteen.

THE COURT: All right.

Q. You have that in front of you, Mr. Young?

A. Yes, I do.

Q. That's what purports to be a Request to Place Newspaper Vending Device in Public Right-of-Way; is it not?

A. That's correct.

[p. 41] Q. That is an official City form which accompanies the regulation Amended Regulation 38; is that correct?

A. That's right.

Q. In other words, if an individual is interested in receiving the City's permission to dispense a publication by means of a newsrack, that individual needs to make a request utilizing this form Exhibit 15; is that correct?

A. That's correct.

Q. And this particular Exhibit 15 reflects the request by the Discovery Center for City permission; is that correct?

A. That's correct.

Q. And this is dated February 17th, 1989?

A. Yes.

Q. And attached to it is a Certificate of Insurance; is that correct?

A. Yes.

Q. And that, too, is required by Amended Regulation 38. In order to receive a permit, you need to demonstrate to the City's satisfaction that you can indemnify and hold harmless the City with respect to any possible damages by - occasioned by means of a newsrack?



A. That's correct.

Q. And it's also correct that what needs to accompany this Request to Place Newspaper Vending Device is a site location and list of locations; is that correct?

[p. 42] A. Yes.

Q. And, in fact, you received all those from the Discovery Center on or about February of 1989; did you not?

A. Yes.

Q. And at the time you received that application and the accompanying materials pursuant to Amended Regulation 38, you had knowledge of the nature and character of the Discovery Center publication; did you not?

A. I did not personally process the application from Discovery Center.

Q. It was processed by Mr. Goldsmith; is that correct?

A. Yes.

Q. And he was your designee?

A. Yes.

Q. And he was issuing under your auspices and with your authority; is that correct?

A. That's correct.

Q. And you ultimately came to know that the Discovery Center had received permission to place -

A. Yes.

Q. - newsracks on the City right-of-way; is that correct?

A. Yes.

Q. And you also knew at this time or felt at this time that there was no grounds by which the Discovery Center could be denied this request?

[p. 43] A. I don't recall exactly what time I became aware of this particular permit and whether by that time the concerns had arisen regarding the Discovery Center.

THE COURT: But at the time that, I guess, the permit was granted, you knew of no reason to reject it?

THE WITNESS: That's right, although I was not aware it was processed at this time. It was processed by my designee.

THE COURT: But looking at the time it was granted - does it show on here when the permit was granted?

MR. MEZIBOV: February of '89, Your Honor.

THE WITNESS: Yes.

THE COURT: All right. And that seems to be the same date as the other one. Wasn't the other one February - the other was July of '89.

MR. MEZIBOV: July.

THE COURT: February of '89 was before July of '89 so you would probably have known of no reason at the time this was granted to reject it or you would have had it rejected?

THE WITNESS: That's correct.

Q. Mr. Young, in the ensuing months after Discovery Center received its permit on or about February of 1989, you did not become aware of any damage or injury claims attributed to Discovery Center's newsracks; did you?

A. No.

[p. 44] Q. Or any with regard to Harmon's newsracks?

A. No.

THE COURT: "No," what? I'm sorry; I didn't understand.

MR. MEZIBOV: "No," he did not receive any information or complaints concerning -

THE COURT: Oh, no complaints.

A. I question that, sir. You asked if there were damage -

Q. Yes, damage claims.

A. And I was not aware of any damage claims. There have been some complaints.

Q. You did receive a complaint, did you not, from an individual in Hyde Park concerning the placement of a Discovery Center newsrack?

A. Yes.

Q. And were you aware that that particular individual who voiced that complaint spoke with Ms. Moertl from the Discovery Center?

A. No, I wasn't.

Q. Were you aware that that complaint was satisfied?

A. It was satisfied because the complainant was advised that the orders had been issued to Discovery Center to remove all of the boxes at that time.

Q. Well, what was the complaint that was registered by the individual in Hyde Park; do you recall?

[p. 45] A. I don't recall in detail. I think the general concern was esthetics and the feeling that it obstructed access to the store.

Q. Well, in fact, she complained, did she not, that this particular newsrack was in front of her store or close to the entrance of her store?

A. I don't have the complaint in front of me, but that is my general recollection, yes.

Q. Let me show you, Mr. Young, a letter that was a [sic] addressed to you in April of 1990.

THE COURT: Do you have it marked, please?

MR. MEZIBOV: Should I have it marked?

THE COURT: Yes. Mark it first.

(Clerk marking the exhibit.)

Q. Mr. Young, let me show you what's now been marked as Plaintiffs' Exhibit 35. Is that the complaint about which you made reference?

A. Yes.

Q. And did you ever personally speak to the individual who registered that complaint?

A. No.

Q. What you did was write her a letter; did you not?

A. That's correct.

Q. And I believe that letter is maybe the next piece of paper over.

[p. 46] A. Yes, I have it.

Q. And that's a letter from you to whom?

A. To Ms. Susan Johnson, Store Manager of the Carriage Trade store in Hyde Park.

THE COURT: The what store?

THE WITNESS: The Carriage Trade store in the Hyde Park Square.

Q. And in that letter you inform Ms. Johnson that the problem with respect to the Discovery Center will be resolved because the City is ordering Discovery Center to take all its boxes from the City right-of-way?

A. That is correct.

Q. On the grounds that they constitute a commercial handbill?

A. That is correct.

Q. You never addressed specifically the nature of her objection which was the placement and location of the news box; is that correct?

A. No, I did not.

Q. And to this day are you aware of the placement of Discovery Center's newsrack as it affects the Carriage Trade store?

A. Not specifically, no.

Q. Do you know that the Discovery Center's newsracks are still out there on the right-of-way?

A. I understood some of [sic] had been removed, but we have not [p. 47] pursued the issue since the litigation in this case started.

Q. So you do not know of your own knowledge whether or not that complaint of Mrs. Johnson or that concern of Mrs. Johnson has been cured or satisfied?

A. No, I do not, other than by our letter.

Q. You never heard again from Mrs. Johnson; did you?

A. No.

Q. Is that the extent of any complaints you've heard registered with respect to either Discovery Center or Harmon?

A. That's the only one that I'm specifically aware of.

Q. And have you ever had any personal contact with Discovery Center or Harmon since the time that they applied for permits which would indicate to you that they, either Discovery or Harmon, was uncooperative in the City's interest in promoting esthetics and safety concerns?



A. No.

Q. Now it's accurate, is it not, Mr. Young, that in February, approximately February 1st, 1990, you received a memorandum from the City Manager, Mr. Johnson, as relates to newsracks?

A. That's correct. That's not the exact date, but in substance that's correct.

Q. Fine. I'm going to ask you to turn to Exhibit 2, if you would, please. Could you identify Exhibit 2 for us, please?

A. Exhibit 2 is a report from the City Manager to City Council in response to a motion from Council Member Mann. The [p. 48] substance of the report is that there are publications being placed in dispensing devices on the City right-of-way which violate the sections of the City code regarding non-commercial and commercial handbills.

Q. Now was any particular publication identified in this memorandum?

A. Not in this memorandum, no.

Q. Now I'm going to direct your attention to the final paragraph of this memorandum that paragraph which begins, "I am directing the Public Works Department" -

A. Yes.

Q. - is that correct? Mr. Johnson goes on to indicate that with regard to Administrative Regulation No. 38, approvals for newsrack permits should be limited to

daily or weekly publications primarily representing - or presenting coverage of, and commentary on, current events; is that correct?

A. That's correct.

Q. Is that the first time you had seen that language in any directive or written policy from anybody in the City?

A. Yes.

Q. And did that memorandum and that particular language cause you to take some action with regard to existing permits?

A. Yes, it did.

Q. What did you next do?

A. There were several publications being dispensed from boxes [p. 49] or devices on the street which we felt were commercial handbills under the provisions of the sections of the code that are involved, and included among them were Discovery Center and Harmon Publication's *Homes Magazine*. We wrote letters to them -

THE COURT: The three publications are Discovery Center, Harmony (sic) and Homes?

THE WITNESS: Harmon is the publisher of *Homes*.

THE COURT: Yes. Discovery Center, *Homes*. That was it?

THE WITNESS: No, Christians Singles publication.

THE COURT: What was that?

THE WITNESS: Christian Singles publication.

THE COURT: Discovery, Harmony (sic). What does that cover, Christian Singles?

THE WITNESS: Christian Singles is actually two magazines: one oriented to, I believe, Protestant and one oriented to Catholic readers which has personal notices for companionship.

THE COURT: That's considered commercial. Do you consider that commercial?

THE WITNESS: We did, yes.

THE COURT: Commercial handbills?

THE WITNESS: Uh-huh; they're advertising.

THE COURT: You think you'd probably get some debate [p. 50] on that?

(Laughter.)

THE COURT: Okay. Those are the three.

THE WITNESS: I have to put it this way, Your Honor: we didn't consider it news.

THE COURT: Okay.

Q. Now you indicated that "We" considered these publications to be in violation of City ordinance; is that correct?

A. Yes.

Q. And would you tell the Court who is included in the term "We?"

A. My staff with -- concurrent with representatives of the City Solicitor's Office.

Q. Were you told at the time you received the memorandum from Mr. Johnson that the City considered Discovery's publication and Harmon's publication to be in violation of City code?

A. No. We concluded that based on our own review of the publications.

Q. And did you consider those publications in light of City ordinance 714-1-C which defines a commercial handbill?

A. Yes.

Q. Is that what makes those publications in violation of City code, the fact they would constitute commercial handbills?

A. Yes.

Q. You're familiar with the terms of that City ordinance; are [p. 51] you not?

A. Generally. I would have to look at the exact wording.

THE COURT: What is that ordinance again?

MR. MEZIBOV: 714-1-C, Your Honor.

THE COURT: Okay.

Q. Let me read that to you.

THE COURT: In the exhibit book here?

MR. MEZIBOV: It's not in the exhibit book. It's in some of the memoranda.

THE COURT: All right.

Q. " 'Commercial handbill' shall mean any printed or written matter, any sample or device, dodger, circular, leaflet, pamphlet, paper, booklet or otherwise reproduced original or copies of any matter of literature:

(a) which advertises for sale any merchandise, product, commodity or thing."

Is that what in your opinion Discovery Center and Harmon's publications do?

A. I believe there are several other subsections.

Q. Well, would you believe that Discovery Center and Harmon are in violation of that particular provision?

A. I believe they advertise in the one case a thing, a home or homes, and in the other case a service.

Q. Have you ever looked at *The Cincinnati Enquirer* or *The Cincinnati Post*?

[p. 52] A. Yes.

Q. Do you believe that either of those publications advertises for any sale of merchandise, product, commodity or thing?

THE COURT: Let me ask. Does this ordinance have a provision relating to the quantity in relation to news?

MR. MEZIBOV: No, the ordinance does not, no.

THE COURT: Is there a copy of the ordinance? I would like to look at the ordinance. It seems to me that is

what what [sic] we're talking about. Maybe you could make a Xerox.

MR. YURICK: Your Honor, it is cited in my trial brief and I have an extra copy of that.

THE COURT: You have an extra copy?

MR. YURICK: Yes.

THE COURT: You don't mind, do you, Mr. Mezibov?

MR. MEZIBOV: Not at all, Your Honor.

THE COURT: Thank you. I would like to take a look at it.

(Document being handed to the Court.)

THE COURT: Thank you.

(The Court reading the document.)

THE COURT: Well, now it's obvious that every newspaper in town contains all these things. Have you got a copy of the ordinance in front of you?

THE WITNESS: No.

[p. 53] THE COURT: Every newspaper in town advertises for service or commodity; doesn't it?

THE WITNESS: Yes.

THE COURT: Does every newspaper direct attention to any business or merchantile [sic] or commercial establishment, or other activity, for the purpose of either directly or indirectly promoting its interest? Newspapers do that; don't they?



THE WITNESS: Yes.

THE COURT: Every newspaper?

THE WITNESS: Yes. However, there are - newspapers are identified in the sections of the code.

THE COURT: Let me get to that in a minute. I'm trying to cut through some of this. And "... directs attention to or advertises any meeting, theatrical performance." Newspapers do that, too. And then they say, "Non-commercial handbills are defined as follows:

'Non-commercial handbills' shall mean printed or written matter, any sample or device, dodger, circular, leaflet, pamphlet, newspaper, magazine, paper, booklet or any other printed or otherwise reproduced originals or copies of any matter of literature not included in the aforementioned definitions of a commercial handbill."

So it sounds to me the newspaper is included in both definitions; isn't it? Just because - did you write this?

[p. 54] THE WITNESS: No, sir. No, Your Honor, I did not.

THE COURT: I have a little difficulty with this, Mr. Solicitor. This is not your draftsmanship; is it?

MR. YURICK: No, Your Honor.

THE COURT: You say something - you say something is a commercial handbill that includes a lot of things which something else includes, and then you say the something else is not a handbill because it's called something else, but it includes the same thing that the first one does. Don't you find that a little confusing?

MR. YURICK: I think taken by itself it is confusing, but there are other provisions of the code which I think make it more clear. For instance, Section 862-1, which is also again cited in my brief, grants permission for people to engage in the business of selling newspapers and for newspapers to occupy space on the sidewalks and city streets. Then again Section 911-17, Cincinnati Municipal Code, states: "Newspapers of general circulation in the City of Cincinnati may be sold from racks, containers and bags attached to poles and other structures on city sidewalks," et cetera, et cetera. And regulation -

THE COURT: But a newspaper can be a commercial handbill because it contains all the materials that are included in the definition of a commercial handbill.

MR. YURICK: But the City of Cincinnati, and there [p. 55] will be testimony -

THE COURT: The practice is opposed to what the ordinance says.

MR. YURICK: - from Mr. Young, yes, that the practice of the City is a longstanding practice to allow newspapers to be dispensed from newsracks.

THE COURT: I understand; but remember we have some constitutional problems here. Mr. Young, let me ask you a question. If the - you're not interested in the content of what's in the publications, are you, from your view? You're only interested in public safety and public works; are you not? I asked the same question of Mr. Richardson. I am asking you a somewhat similar question. If Harmony and Discovery and these others -

Christian Singles – use the same kind of box or rack and was mounted in a fashion that satisfied the safety and considerations that Mister – particularly Mr. Richardson was concerned about – blocking access to intersections or bus stops or access for handicapped people at the intersections and the quantity could be regulated; it wasn't just too crowded with these boxes – that would satisfy your need as a Director of Public Works; wouldn't it? You're not interested in the content. What I'm trying to distinguish, safety has nothing to do with content; does it?

THE WITNESS: Your Honor, my primary responsibility [p. 56] is safety and convenience of the public. However, it has been our position, and we felt supported by the code, that predominantly advertising – and there is a difference, we felt, and in consultation with the Law Department, between newspapers as we commonly know them – *The Enquirer*, *The Post*, *The New York Times* – between those publications which have a great deal of current news editorial content, opinion, public information, as well as the substantial amount of advertising. But they do have those other parts that are content. The Discovery Center and Homes magazine we felt do not have that type of information included in them.

THE COURT: Doesn't that get into the real problem we have here, that you're deciding whether somebody has access to the public thoroughfare because of the content of what they are saying?

THE WITNESS: Because it is a commercial publication rather than a newspaper as –

THE COURT: Well, a newspaper is a profit-making operation. What makes a newspaper go is not the money that they get for each copy that they sell; it is the money they get from their advertisers, is it not?

THE WITNESS: We understand that.

THE COURT: And so it's a business operation for them as well as for the others. How do you distinguish? Or is it fair to distinguish under the Constitution?

[p. 57] THE WITNESS: Your Honor, that –

THE COURT: That is my problem, I guess.

THE WITNESS: That is the issue of this case.

THE COURT: I agree with you it is the issue of the case. What I'm trying to distinguish between –

THE WITNESS: We felt under the terms of the Municipal Code that there is a clear differentiation between the types of publications involved and that the –

THE COURT: It is better for the citizens to have the newspapers in the boxes and not commercial material; is that correct?

THE WITNESS: Not commercial material on public property.

THE COURT: All right. But suppose the commercial materials in the newspapers are in the same kind of boxes, that you had no safety concerns and no quantity concerns and no access concerns: is it any business of the City then to be concerned about what's in those boxes that you're permitting to be sold from them?



THE WITNESS: Your Honor, I continue to have a concern about publications that are almost entirely or entirely commercial in nature. I recognize that there is a difference or that there is commercial material in any of the publications that we all recognize as newspapers. But I have - I personally feel there is a difference. And in general, [p. 58] advertising is not permitted on public property and in that sense we felt this was a consistent decision.

THE COURT: All right. Thank you.

MR. MEZIBOV: Your Honor, I just have a couple more questions.

THE COURT: I appreciate you standing by your guns, too. Last time Mr. Young and I confronted each other, I guess, was 20 years ago in the Pogue's Garage case -

THE WITNESS: Oh, okay.

THE COURT: - in this courtroom. Go ahead.

Q. Mr. Young, again directing your attention to the Johnson memorandum which is Exhibit 2, that is dated February 7th, 1990, in which Mr. Johnson directs you to apply Administrative Regulation No. 38 to daily or weekly publications primarily presenting coverage of, and commentary on, current events. It's accurate, is it not, Mr. Young, that you make a determination of what the term "primarily" means?

A. Yes.

Q. Mr. Johnson didn't tell you what that means; did he?

A. No, except the wording in this report which says, "... daily or weekly publications primarily presenting coverage of, and commentary on, current events."

Q. And you have adopted a 50 percent test in order to apply this directive; have you not? In other words, if a particular publication constitutes 50 percent or more coverage of, and [p. 59] commentary on, current events, then it passes muster under the scheme?

A. We have not formally adopted any numerical guideline. This does not appear to be something that can be put into a computer and pulled out. In my deposition, I think I stated that a 50 percent news versus commercial material might be a possible guideline or a borderline situation as compared with publications which are almost entirely commercial in nature and as compared with the publications that we all recognize as newspapers.

Q. I don't mean to belabor this point. I'll make reference to your deposition at Page 12. Do you recall that I asked you this question: "How do you interpret and apply the wording 'primarily presenting coverage of?' What does 'primarily' mean?" And do you recall your answer on that date as being: "I suppose it's a fairly general term. But I think most people would interpret it, and I think we would interpret, as being at least 50 percent."

A. I don't think that is inconsistent, sir, with what I said.

Q. I wasn't suggesting it was inconsistent. I wanted the record to be clear. Then I understand then, or should



we understand then, that if a particular publication consisted of 40 percent articles and editorial content and 60 percent [p. 60] advertising, that that particular publication would be banned from the city streets?

A. I think each case would have to be reviewed individually and I'm not sure I can answer that -

THE COURT: I think the upshot of this is, you have been delegated by the City Manager or City Council, or however it works, the responsibility of determining which publications pass muster?

THE WITNESS: That's correct.

THE COURT: And that becomes a question of whether this kind of a statute permits that kind of delegation of authority. That is my authority not Mr. Young's problem.

Q. There is no question, Mr. Young, is there, that this memorandum and directive from Mr. Johnson dated February 7th, 1990, has never been enacted into the City code? Has it not, or has it?

A. We believe it's in the code in the provisions of Section 714, the two sections which describe commercial and non-commercial handbills. Now the definition of or the guideline of "... daily or weekly publications primarily presenting coverage of, and commentary on, current events" has not been enacted into any section of the code.

Q. So you again - so I understand, you are interpreting 714-1-C of the Cincinnati Municipal Code in light of this memorandum dated February 7th, 1990; is that correct?

[p. 61] A. That is correct.

THE COURT: Am I correct, counsel, that 714-1-C and 714-1-N's the only two which get into the definition of what is a commercial handbill and a non-commercial handbill?

MR. YURICK: Those are the sections of the code.

THE COURT: Am I also correct that the commercial handbill definition includes these three things which: "... advertise for sale, which direct attention to; (B) which directs attention to any business or mercantile or commercial establishment; (C) which directs attention to or advertises theatrical performance" and so forth? Those are commercial handbills. And the only other definition of a non-commercial handbill is that it, "... shall mean printed or written matter, any sample or device, dodger, circular, leaflet, pamphlet, newspaper, magazine, paper, booklet or any other printed or otherwise reproduced original or copies of any matter of literature not included in the aforementioned definitions of a commercial handbill?"

MR. YURICK: In the code, that's correct. But then again I also think, as I mentioned earlier -

THE COURT: I don't want to know what you think right at this point. I'm just trying to make sure this is what I have to go on.

MR. YURICK: Those are the two sections that define [p. 62] what a commercial handbill is and a non-

commercial handbill is. But I think there are other sections of the code that make it clear that a newspaper is not considered a commercial handbill.

THE COURT: Well, you will have that opportunity. Thank you.

MR. YURICK: Thank you.

THE COURT: Anything else of Mr. Young?

MR. MEZIBOV: One other question, Your Honor.

Q. Mr. Young, are you aware of any provisions in the Cincinnati Municipal Code which I can find a definition of the term "newspaper?"

A. Not specifically, no.

MR. MEZIBOV: That's all the questions I have for Mr. Young. Thank you.

THE COURT: You may redirect.

MR. YURICK: Thank you, Your Honor.

#### REDIRECT EXAMINATION

BY MR. YURICK:

Q. Mr. Young, Regulation 38 that applies, you stated that you gave both Harmon and the Discovery Center - I'm sorry, you have said Mr. Goldsmith granted a Request to Place Newspaper Dispensing Device to Discovery Center, and you, yourself, granted permission to Harmon under Regulation 38; is that correct?

A. That's -

[p. 63] Q. Following Regulation 38; is that correct?

A. That's correct.

Q. But Regulation 38, by its own terms, applies only to newspapers of general circulation; isn't that also true?

A. That's correct.

Q. Okay. In hindsight, would you have granted either one of these publications permission to be on the public right-of-way knowing what you know now back then? I am asking you - I know hindsight is always 20/20, but would you have granted them permission?

MR. MEZIBOV: There is an objection, Your Honor; form of the question.

THE COURT: Yeah. I think you'd better rephrase the question. I'm not sure we're concerned with that. It was done and somebody complained and then the wheels started to turn. But up to that point in time there was no problem; is that correct?

THE WITNESS: That's correct.

THE COURT: Now the wheels are turning and we're trying to figure out whether there is a problem or not. And what I'm trying to find out or not, what's the term under the Constitution which permits you to do these things, public health, safety -

THE WITNESS: And convenience.

THE COURT: Please?

[p. 64] THE WITNESS: Public health, safety and convenience.

THE COURT: We're interested in the safety and convenience. We are not concerned with the health.

THE WITNESS: No.

THE COURT: And the safety has to do with the danger of the pedestrians blocking the sidewalks, the crosswalks and intersections and things like that, as well as whether chaining them to metal poles would cause rust which would cause damage to the poles and expense to the City, and "convenience" could be because of their height they may block view. So the convenience and safety issue could be satisfied by maybe developing an ordinance which would require more uniformity in appearance and quantity which could be located at any one location without getting into the content of these boxes. Is that a fair way of analyzing it?

THE WITNESS: I would - could not disagree with that, sir.

THE COURT: My problem is, that nothing happened with it. It didn't seem to be a problem until somebody complained, and then the complaint was with regard to safety and convenience, and the decision to cause them to be removed didn't seem to have anything to do with the content of what was being said.

THE WITNESS: It had to do with the proliferation of the device. These two publications were the first permits to [p. 65] be requested.

THE COURT: So this gets into the quantity issue.

THE WITNESS: To some extent, yes.

THE COURT: I see.

THE WITNESS: Those were the first two to be requested that were not clearly in the general understanding of newspapers.

THE COURT: Okay. Thank you.

Q. Before you asked Harmon and Discovery Center to move their boxes, you sent them a letter, is that correct, for George Rowe's signature?

A. The letter which was sent to them directed them to remove their boxes by a certain date but also advised them that there was an appeal procedure.

Q. And that appeal provided for administrative hearing; is that correct?

A. Yes, that's correct.

Q. Were such hearings held for both Harmon and Discovery Center?

A. Yes, there were.

Q. And to this date has your office or anybody to your knowledge interfered with either Harmon or Discovery Center's boxes or dispensing devices?

A. No, we have not.

MR. YURICK: I have no further questions of this

. . .

[p. 68] MR. YURICK: I object. I think the witness is trying to answer the question.



THE COURT: Well, do you have any – I think the letter was identified.

MR. MEZIBOV: Yeah. We'll –

A. I don't – that may very well be true. It probably is true. However, the letter was written by my office for the signature of the Director of Public Works and he was not personally involved in the original decision.

Q. Well, I'm going to ask you to look at Exhibit 16, please. Do you have 16 in front of you?

A. Yes, I do.

Q. And that purports to be a letter over the signature of George Rowe, Director of Public Works, to Margaret Moertl, dated March 8th, 1990; is that correct?

A. Yes.

Q. And by this letter the City advised Mrs. Moertl that her publication or Discovery Center's publication constituted a commercial handbill and that Discovery Center needed to remove its news boxes from the City right-of-way; isn't that correct?

A. That's correct.

Q. And did you instruct Mr. Rowe to send this letter?

A. I sent it to him with my initials which constitute a recommendation that it be sent.

Q. And Mr. Rowe, therefore, was the appropriate person to [p. 69] issue the city directive in this particular regard; is that correct?

A. Yes, but again he did not personally participate in the decision.

Q. He was relying on your advice; is that correct?

A. That's correct.

Q. And then was he relying on your advice at the appeals hearing at which he sat when Mrs. Moertl came to plead her case?

MR. YURICK: I'll object to the question.

THE COURT: Overruled. Go ahead. You may answer.

A. No, he was not at the appeal hearing. He heard Mrs. Moertl make a very spirited and thoughtful presentation of her case and he then voted as he saw fit based on the issues.

Q. Mrs. Moertl's presentation was either not spirited or thoughtful enough; in any case, it was rejected, is that correct?

A. That's correct.

Q. And I see copied on this letter of March 8th was Mr. Ganulin from the Law Department; is that correct?

A. Yes.

Q. And he participated in the decision-making process which resulted in this particular letter being sent out on March 8th; is that correct?

A. I honestly don't recall whether he personally participated [p. 70] in the decision or not. He certainly was involved in earlier discussions as to what constituted

a non-commercial handbill and a commercial handbill. I honestly don't recall whether he participated specifically in a review of Discovery Center or Harmon Publications' *Homes Magazine*.

Q. Let me ask you this, Mr. Young: You have indicated that three of you sat as the Sidewalk Appeals Committee; is that correct?

A. Sidewalk Appeals Board.

Q. Appeals Board. And as I understand it from your responses earlier to Mr. Yurick, the purpose of the existence of the Sidewalk Appeals Committee is to deal with matters which affect the physical appearance and safety of public sidewalks; is that correct?

A. Yes.

Q. The Sidewalks Appeal Committee was never constituted nor was its purpose ever defined as a board by which to make determinations of what constitutes commercial as opposed to non-commercial expression; was it?

A. Not specifically; but it was constituted to deal with sidewalk safety and we felt this was - it was felt this was in the overall area of responsibility of the Sidewalk Board of Appeals.

Q. Again just so the record is accurate, Harmon and Discovery Center were not required to take their news boxes off the City [p. 71] right-of-way because they presented a safety problem or esthetics problem; isn't that correct?

A. Specifically, no. In general terms, the issue of proliferation of dispensing devices can be a safety issue and is a safety issue in some areas, and it was felt that devices - that publications which are not authorized by the Cincinnati Municipal Code's provisions would be an appropriate start in dealing with the issue of proliferation and safety as they affect safety.

Q. What was it, Mr. Young, that Mrs. Moertl and Harmon needed to convince the Sidewalk Appeals Committee in order to keep their news box on the street? Did they have to convince that committee that other publishers would not place boxes out on the street so that the City would be allayed concerning possible proliferation? Was that the purpose they had to meet at that hearing?

A. The burden that they had to meet at the hearing was to show that they were a non-producing - producing a non-commercial handbill as opposed to a commercial.

Q. And what standards did they have to meet to meet that test?

A. The basic guidelines were those in the City Manager's report of February 7, 1990. What is the exhibit number?

Q. That's Exhibit 3.

A. No -

[p. 72] Q. I'm sorry; number -

THE COURT: Two.

Q. Number 2.

A. Number 2, ". . . primarily presenting coverage of, and commentary on, current events," daily and weekly publication - daily or weekly publication.

Q. And it's correct, is it not, Mr. Young, the first time my clients were ever advised of this particular directive or clarification or standard was in your letter advising them they needed to remove their newsracks?

A. That's correct, yes.

Q. And the City never passed this guideline, February 7th, 1990, into law; did they?

A. No, the report was approved by City Council but that does not make it a law.

Q. So, the only way my clients would have known this was the new view of Amended Regulation 38 is because you told them that at the appeals hearing; is that correct?

A. No, that's not correct. They were told that in their letter, I believe, in the letter ordering them to remove. And since they had not been previously notified, the appeal process was provided.

THE COURT: Let me ask this question. When a person gets a permit from the City, what does the permit permit them to do and for how long?

[p. 73] THE WITNESS: Under the Amended Regulation 38, it permits them to place dispensing devices at locations which they list by location or provide a site plan for a period of one year. To retain the permit once issued, they have to resubmit that list on an annual basis.

THE COURT: Everybody resubmits every year, gets a new permit every year?

THE WITNESS: Yes.

THE COURT: Is there a license fee that goes along with it?

THE WITNESS: No, there is not.

THE COURT: Is not.

Q. You have indicated, Mr. Young, you have been concerned with proliferation of these newsracks on the City right-of-way. Are you familiar with how many newsracks are currently on the public right-of-way?

A. In precise numbers, no. Order of magnitude, probably yes. It's probably in the neighborhood of 1500 to 2000.

Q. And, out of those 1500 to 2 - 1500 to 2000, approximately 50 to 60 of those belong to Discovery Center and Harmon; is that correct?

A. I don't recall the numbers precisely, but I'll accept your figures.

MR. MEZIBOV: That's all I have, Your Honor. Thank you.

[p. 74] THE COURT: You were formerly Traffic Engineer; were you not?

THE WITNESS: Yes, I was, sir.

THE COURT: In that role, were you concerned about the number of taxicabs in Cincinnati or proliferation of the number of taxicabs in Cincinnati? Let me ask



you this as an old hand at City Hall: How do they handle the licensing of – of the City licensed taxicabs? I know in other cities they have to have a medallion and there is a number, there is a finite number of taxicabs that are permitted in the city. Is there a similar situation here?

THE WITNESS: There was at one time, I believe. Essentially, the cap on the number has been essentially removed.

THE COURT: See, I have to decide this on what is the least restrictive method of accomplishing the concerns that you have, which includes public safety and convenience which also includes proliferation; and if that can be accomplished without infringing on anybody's First Amendment rights, that would be the best way to do it, and that's what's running through my mind. So I think counsel should be aware of that, too. We thank you, Mr. Young, for your testimony.

\* \* \*

MARGARET MOERTL

[p. 77] A. I put together the program, arrange new activities. I'm responsible for distribution of the magazine. And I administer the local office, I'm in charge of facilities; every aspect of running the business in Cincinnati.

Q. Could you tell us the history of Discovery Center here in Cincinnati, when it first came and how it developed?

A. Yes. We began in 1982 here in Cincinnati. There are independent learning programs similar to ours in

many cities around the country and we saw that Cincinnati was a good city that had a lot to offer and that would support a program like this.

Q. Now, does the Discovery Center promote its program and activities by means of a magazine?

A. Yes.

THE COURT: By means of what?

MR. MEZIBOV: A magazine.

A. Yes; that is, we have tested various other ways to advertise our programs, and what seems to benefit the students and the people who present the programs through us the best is by producing our own magazine and distributing that.

Q. Ms. Moertl, I'm going to ask that you be handed a copy of Exhibit No. 24.

MR. MEZIBOV: (To the Clerk) That may be one of the separate items. Yeah. (Clerk complying.)

[p. 78] THE WITNESS: Thank you.

MR. MEZIBOV: Thank you, Ms. Schaeffer.

Q. Do you have in front of you now, Ms. Moertl, what's been marked Exhibit No. 24?

A. Yes, I do.

Q. And could you identify that for us, please?

A. This is the May/June issue of Discovery Center Magazine.

Q. How often is that particular publication put together?

A. We publish nine times a year, approximately every nine weeks I'm sorry, every six weeks. I'm sorry.

Q. And is there a charge for that magazine?

A. No. We feel it is inherent in the nature of our operation that the publication be free to the general public.

Q. Could you tell us, Ms. Moertl, what information is intended to be conveyed through and by means of that particular publication?

A. We offer descriptions of the various programs and courses that are offered by the individuals and organizations who work with us, and we provide information on what's hot in Cincinnati through those listings and other things.

THE COURT: What do you mean by, "Hot in Cincinnati?"

THE WITNESS: "Hot in Cincinnati," we try to offer classes in programs through Discovery Center.

THE COURT: "Hot in Cincinnati" relating to programs, classes, theater or whatever?

[p. 79] THE WITNESS: All of the above, Your Honor. For example, we work with the Cincinnati Ballet to present An Evening at the Ballet. The Ballet uses it as an opportunity to attract new people, new patrons to the ballet, and they have been very pleased with the result.

Q. How does the Cincinnati Ballet - how does -

A. Excuse me. Go ahead.

Q. Could you describe more fully how the Cincinnati Ballet would use your magazine and your program to promote its purposes?

A. Yes. They work with us to develop a specific evening event; in this case, it's an opening - it's always opening night and it includes a backstage tour and post-performance reception with the dancers and the artistic director of the ballet, and we arrange to - we put that in our magazine at no cost to the Ballet and then we share, if it's successful, whatever, we share in the fees that come in to Discovery Center from - for that event and we handle the registration and so on and we tell the Ballet how many people to expect and how many tickets to issue and so on and they take it from there.

Q. Who are your intended readers?

A. Everyone in Cincinnati. We think it's important to keep learning new things all through your life, so we try to get everybody in the Tri-state. Do you mean specific demographics?

Q. Yes. And who are the people you intend to reach or try to [p. 80] reach through this -

A. All right. Well, adults, the average age of our students is about 35, and it's primarily - well, it's more women than men, some more single people than married although that is pretty close. That is more or less the demographics. We find Downtown workers, visitors to the city, as well as residents in the outlying areas are all potential students for programs offered through Discovery Center.

Q. Have any organizations or companies used your magazines for their purposes other than to sell your classes, for example?

A. Yes, there have been several instances of that. One, for example, is when Chiquita moved several hundreds of its employees into the area from the New York area, they faced an attitudinal behavior. Some of the people moving from New York were concerned they were moving to a small town where there wasn't much going on, and so we provided the relocation people who were working with Chiquita, provided them with lots of our magazines, and for several months before the transferees actually moved into this area to help overcome that block and to help them understand Cincinnati is a vibrant and vital place and there are lots of things going on.

Q. Now prior to 1989, how did you distribute your particular magazine?

A. We distributed, prior to 1989, we distributed our magazine [p. 81] to our students who have taken classes through us before and to people who called and asked to receive our magazine and where we could through various retail outlets, bars and restaurants and so on where the manager would permit us to put a small rack on a cigarette machine or something. We've tried also other kinds of distribution.

Q. And in about 1989 did you make a decision to attempt to distribute your magazine by a new means?

A. Yes, we determined that newsstand boxes would be an effective way for us to serve the public in Greater Cincinnati.

Q. Now, I'm going to ask you to look at the book of exhibits and particularly turn to Trial Exhibit No. 15, if you would, please.

A. Yes.

Q. Can you identify that for us, please?

A. That was our Request to Place Newspaper Vending Device in Public Right-of-Way and that was the request that was attached to Regulation 38.

Q. And did you, yourself, participate in this application process?

A. I did the application myself.

Q. And did you have any conversations with any City officials before you submitted that application?

A. Yes, I called first the Mayor's Office and inquired about whether or not we might be able to put our magazine on City [p. 82] streets and was directed to Ralph Goldsmith in the Public Works Office or Engineering Office. I guess Public Works Office. And Mr. Goldsmith told me he was not aware there would be any problem and sent me the appropriate copy of Amended Regulation 38 and forms and so on.

Q. Okay. When you say, "Amended Regulation 38," are you referring to that which has been marked as trial Exhibit No. 1?

A. I am.

Q. And were you referred to any other particular City ordinance or City regulation which would assist you



or educate you with regard to your application for newsrack permit?

A. I was not.

Q. Were you led to believe by anything Mr. Goldsmith said or advised you or referred you to that you would have difficulty receiving a City permit?

A. No; in fact, we consulted with the City before we purchased the boxes, because as a small company, this was a big expense for us.

Q. Did your company own news boxes before this time?

A. No, we did not.

Q. And what was your purpose then in consulting with the City before you purchased these news boxes?

A. To make sure we would be able to use them if we purchased them.

Q. And -

[p. 83] A. And we were led to believe that would be the case and, in fact, subsequently we were granted that permission.

Q. Do you recall either the names or the titles of those officials with the City with whom you spoke concerning newsracks?

A. I believe I spoke exclusively with Mr. Goldsmith.

Q. And following your conversations with Mr. Goldsmith, did your company purchase these racks?

A. Yes, we did.

Q. And could you recall approximately how many you did purchase?

A. We purchased about fifty.

Q. And did you utilize all fifty in the City?

A. Not all of them are in the City. The majority of them are in the City. The majority of them are Downtown. We have about 38 of them in the Downtown area.

Q. Is that how many newsracks you now have placed on the city right-of-way?

A. The City total we have closer to 45.

Q. And that was all pursuant to approval of your application which is Exhibit 15?

A. That's correct, and that would be February of 1989, about a year-and-a-half ago.

Q. At what cost did you purchase these newsracks, approximately?

[p. 84] A. Approximately it was in the ballpark of about \$7,000, something like that. We bought them used.

Q. Were you given any guidelines from the City or anyone else as to the type of newsrack you needed to purchase or its appearance?

MR. YURICK: I'll object to that question as to what anyone else - what guideline she received from anyone else.

THE COURT: Yeah.

MR. MEZIBOV: I'll limit that to the City.

THE COURT: Rephrase your question.

Q. Did the City give you any guidelines or requirements with regard to the physical appearance or configuration of the news boxes?

A. The only guidelines I received were those contained in Amended Regulation 38.

Q. Did you provide to Mr. Goldsmith a copy of your magazine -

A. Yes, I did.

Q. - at or prior to the time you presented your application?

A. I don't recall whether it was at or prior to the time, but I did submit and he, in fact, as I recall, was somewhat familiar with the publication, I guess.

Q. There was no question that the publication you ultimately distributed on the City right-of-way was the same publication -

[p. 85] A. There is no question it's -

Q. in force at the time you made your application?

A. Yes.

Q. I'm going to ask you to look at the packet of photographs which are Exhibit Numbers 33. (Clerk handing the exhibit to the witness.)

Q. And more particularly, Ms. Moertl, I'm going to ask you to look at Exhibit 33. Look on the the back. There should be one marked 33.

A. Thirty-three even?

Q. Just 33 even.

A. I have that photograph.

Q. And can you tell us what that particular photograph depicts?

A. It depicts *The Cincinnati Business Record*, *The Wall Street Journal*, and the Discovery Center Magazine boxes in a line on a City sidewalk.

Q. Now with reference specifically to the Discovery Center newsrack, is this an example of the newsracks which Discovery Center purchased for placement on the City's right-of-way?

A. It is.

Q. Is this the identical newsrack which is utilized in the various locations throughout the City?

A. It is. There is some difference. We have most of them on the pedestal stands and some of them on the four-legged stands, [p. 86] but essentially it's the same box itself.

Q. Prior to placing any newsracks belonging to the Discovery Center on the right-of-way, had Discovery Center received from the City permission to place that newsrack at that particular location?

A. Yes.

Q. In other words, all of the locations had been preapproved by the City; is that correct?

A. Presumably. There were no objections as long as - in accordance with the Regulation No. 38, we submitted our location list and so on, and that was all approved.

Q. And you placed all your newsracks -

A. Where we said we were going to put them.

Q. In conformance with the site locations you had provided?

A. That's correct.

Q. Were you told how to anchor or to affix these newsracks at any given site?

A. No, we followed the norm, which were chains.

Q. Have you ever received any complaint or any question about the manner in which any particular Discovery Center newsrack was placed or mounted?

A. We received directly - the woman from the Carriage Trade, who was described earlier, contacted us directly. Also, there had been earlier, when we first put the boxes out, another merchant Downtown who had contacted us because he didn't like [p. 87] having a rack in front of his business and we moved it within 24 hours.

Q. Did you do that also in the Hyde Park location?

A. Yes.

Q. Was that resolved to everyone's satisfaction to the best of your knowledge?

A. Yes.

Q. Did anyone from the City ever advise you that your newsracks presented a problem from the esthetic standpoint, that they would not be approved?

A. No.

Q. Were you told that there was particular guidelines or requirements which you needed to follow with regard to the physical appearance of your newsracks?

A. No.

Q. And you also provided, did you not, comprehensive liability insurance with your application?

A. I did.

Q. And you have maintained that in full force, have you not -

A. We have.

Q. - since that time?

A. Yes.

Q. Now did there come a time, Ms. Moertl, when you were advised by the City that your newsracks were in violation of [p. 88] the City code?

A. Yes, in a letter that I received in March.

Q. I'm going to ask you to turn to Exhibit 16, please.

A. Yes.

Q. Could you identify that letter for us, please?

A. That was the letter addressed to me from - signed by George Rowe, indicating that we have had 30 days to remove our boxes from the City right-of-way.



Q. And it also indicated in the final paragraph, did it not, that if you wished an administrative hearing, you could have one?

A. Yes.

Q. And did you, in fact, request such a hearing?

A. I did.

Q. And could you tell us whether you participated in a hearing?

A. I did.

Q. And when did that take place and with whom?

A. The hearing was on April 5th and there was a representative of the Public Works, of Engineering, and of the City Solicitor's Office present.

Q. Was Mr. Young present?

A. Yes, Mr. Young was present, Mr. Ganulin.

Q. Mr. Ganulin who is seated at counsel table?

A. Yes.

[p. 90] Q. Did the City ever ask you to make any changes in either the type of newsrack that you used or the manner in which you anchored it or affixed it to the right-of-way?

A. The City did not approach us directly. I was invited to a meeting in January which was organized by some of the other people with newsracks on the streets and we learned there of some of the City's concerns with regard to chains and so on and proposed a voluntary plan

back to the City which we agreed to participate in to address some of those concerns; for example, plastic sleeves on chains, or whatever.

Q. So you have indicated to the City a willingness to conform your news boxes and the manner in which you present them on the City right-of-way in accordance with whatever City regulations are needed?

A. Yes.

Q. Have you ever indicated to the City or any of its officials that you would not change the manner either of your newsrack or the way in which you utilize your newsrack?

A. No. In fact, I tried to be invited to the meetings which took place, which resulted in the draft regulation that's now on the drawing board, and I was not - I was told I was not invited to those meetings.

Q. I'm going to ask you to turn to Exhibit Number 3, please.

A. Yes.

Q. Is that the proposed regulation that you've just [p. 91] mentioned?

A. This was the first time I have seen this particular form, but yes, it does seem to address the issues that I spoke with Mr. Richardson about.

Q. I'm going to ask you to take a moment to look at this particular exhibit if you've not yet seen it.

A. Uh-huh.

(Witness reading the exhibit.)

A. I have read it over quickly.

Q. Have you reviewed Trial Exhibit 3, which is the proposed Administrative Regulation dated June 14th, 1990? Is there any provision set out in that exhibit which Discovery Center would not be able to comply with as relates to its newsracks?

A. Based on a quick review, I would answer no.

Q. Is there any provision or requirement set out in this proposed regulation that Discovery Center would be unwilling to comply with?

A. No, I don't think so.

Q. What percentage of the Discovery Center Magazines are distributed currently by means of newsracks placed on the City right-of-way?

A. Approximately a third; about 32- to 33 percent.

Q. And what were -

THE COURT: A third of your magazines are distributed through newsracks. Is that what you're saying?

[p.92] THE WITNESS: Yes, sir.

Q. What is the significance of Discovery Center's being able to distribute its magazine through newsrack?

A. Well, it's a third of our distribution. It's become an important - over the last year-and-a-half, it's become an important way for people to recognize us and they know they can always find our magazine, you know, by

going to their street corner, and that's important. If those were to disappear all of a sudden, I think that would cause some irreparable harm to us and, frankly, there is not another way for us to distribute those same 32 percent in the kind of way - in that kind of way and reach the same kinds of people.

Q. Are you aware of any comparable means of distributing those magazines which would have the same impact for your business as to newsrack?

A. Well, from 1982 to 1989 we tried to find various means, the most effective means, and this has been the most effective means that we have found thus far.

MR. MEZIBOV: That's all the questions I have, Your Honor.

THE COURT: Thank you. You may cross.

#### CROSS-EXAMINATION

BY MR. YURICK:

Q. Ma'am, my name is Mark Yurick. I represent the City of Cincinnati, the defendant in this case. Ma'am, you don't [p. 93] contend that you publish a newspaper; do you?

A. I don't contend we're a newspaper.

Q. Okay. And, in fact, the information that's contained in your magazine, and as to your courses, is basically or solely a description of the course and then any materials' fee and then the fee for the course; isn't that right?

A. No; in addition to the class listings and course descriptions there are also some outside advertisers who use our publication and some other offerings of tapes and books and so on to complement our classes.

Q. Advertising; isn't that correct?

A. Those businesses are advertising.

Q. It's all advertising?

A. Well -

Q. You're advertising your classes and then some outside agencies utilize your magazine to advertise their services, but it's all advertising?

A. I don't know. I guess. I mean, in some regard.

Q. And you stated earlier that this is the way you choose to advertise your programs; isn't that right?

A. Right.

Q. Okay. And you had tried other means of advertising that are available to you and there are other means of advertising available to you but you just don't think they are as effective as this way; isn't that right?

[p. 94] A. I suppose.

Q. Okay. You are again a for-profit corporation; isn't that right?

A. We are.

Q. You don't have any sort of tax exempt status or you're not - you provide adult education and other sorts of classes for money. That is what you do; isn't that right?

A. We market and promote instructor's classes. They are not our classes; we're not a school.

Q. Okay. For which you get a fee? You market it and promote these classes and get a fee?

A. Only if someone registers for the class. There is no purchase inherent in picking up the magazine.

Q. Right. But the reason that you publish the magazine is to get people to apply for these classes so that you can get the fee; that is your -

A. Usually.

Q. - your reason for being?

A. Yes, that's -

Q. And is it also correct that your testimony was two-thirds of your magazines are distributed outside these dispensers; is that correct? Through direct mail or through, I don't know, dropping them off on people's porches, et cetera?

A. We don't drop them off on people's porches, but other means.

[p. 95] Q. Other means. Two-thirds?

A. Approximately.

MR. YURICK: I have no further questions - oh, I'm sorry; yes, I do have a couple other questions.

Q. Did you pay a fee to the City of Cincinnati for permission to place these dispensers on the public right-of-ways?



A. No, there is - no, there was no fee required.

Q. And have any of your boxes, to your knowledge, been disturbed by any member of the City of Cincinnati?

A. Yes; on occasion when there are street festivals or whatever, they have cut the chains and moved the boxes back, that sort of thing.

Q. But, I mean, have representatives of the City of Cincinnati come and confiscated your boxes?

A. Not that I'm aware.

Q. Well, that is what I am asking you -

A. Okay.

Q. - to your knowledge.

A. To my knowledge, no.

MR. YURICK: I have no further questions at this time.

MR. MEZIBOV: I have nothing further of this witness.

THE COURT: Thank you, Ms. Moertl. You may step down.-

(Witness excused.)

[p. 96] MR. MEZIBOV: Your Honor, our next witness will be Greg Goff.

THE COURT: How long will he take?

MR. MEZIBOV: Approximately the same time as Ms. Moertl. Maybe a little shorter.

THE COURT: I would like to recess here by quarter of 12:00. How many more witnesses do you have, Mister -

MR. MEZIBOV: This will be our final witness.

THE COURT: All right. And how many witnesses do you have, Mr. Yurick?

MR. YURICK: I have two witnesses, Your Honor: Mr. Young and Mr. Richardson again. They'll be very quick.

THE COURT: Okay. Well, let's start with this gentleman and we'll recess at quarter of 12:00 and probably resume quarter after 2:00, and that should give us plenty of time to finish the testimony.

MR. YURICK: It should.

THE COURT: I would like you to think during the lunch hour, Mr. Yurick, if this regulation, I guess Plaintiffs' Exhibit 3, is adopted by the City, that would accommodate all the needs under the constitutional strictures of public health, morals and public health, safety and convenience; wouldn't it?

MR. YURICK: I'm not sure it would, Your Honor, and I guess I'll get more into that in my case. Part of the proliferation argument is there is a limited number of space -

[p. 97] THE COURT: The regulation talks about that.

MR. YURICK: There is a limited number of space and to put purely public commercial speech on the

right-of-way, which is a public forum, I believe is impermissible under the Constitution in the United States as it's been applied by the Supreme Court, and the Supreme Court has made a clear distinction between the protection to be attached to commercial speech and the protection to be afforded non-commercial speech. And I think if the Court puts the two forms of speech on a par, I think it's constitutionally impermissible.

THE COURT: You're assuming something I haven't done. It's the City who is adopting this proposed regulation and the proposed regulation doesn't distinguish between the two. Now maybe the proposed regulation will go one step further and maybe set up some method of giving priority to newspapers but without eliminating the other -

MR. YURICK: Without eliminating -

THE COURT: - "the other" being the folks such as the plaintiff in this case and the Christian Singles. Well, I guess there are several other publications that may use racks.

MR. YURICK: Well, I think that -

THE COURT: You see, I have to decide this case also on the least restrictive method. The whole concept under the Bill of Rights is to permit people to do what they want and not restrict them. The Bill of Rights comes into play where their [p. 98] activity interferes with rights of others or the City is interfering with rights guaranteed under the Bill of Rights.

MR. YURICK: That's correct.

THE COURT: Least restrictive way of interfering with the citizens may be less restrictive than what you're doing, barring them entirely any commercial speech through the use of newsracks.

MR. YURICK: Well, there I think that the -

THE COURT: Is my analysis correct in what my duty is?

MR. YURICK: With all due respect to the Court, I really don't think it is.

THE COURT: I appreciate your candor. I would like you to tell me -

MR. YURICK: I don't think it is a least restrictive means test in the area of commercial speech. I think there is a four-part test that's been adopted by the Supreme Court -

THE COURT: Uh-huh.

MR. YURICK: - and that in those cases where the Supreme Court talks about how burdensome the regulation can be or how restrictive the regulation can be, they talk about one directly affecting the safety - the - directly affecting the substantial state interest and also talk about barring no more speech than is necessary to accomplish the required directive, and I think it is a lot different than saying it is a least [p. 99] restrictive means test.

THE COURT: Barring no more speech than is necessary, I think, is somewhat similar to the least restrictive method of keeping the public from having an opportunity to view these things that are purveyed by the

plaintiffs here which just effects the plaintiffs' right to expression to -

MR. YURICK: But the plaintiffs, and I believe there is testimony to this fact - we're not barring speech. Two-thirds in *Discovery Learning's* case.

THE COURT: Yes, I understand.

MR. YURICK: We're not barring that speech. There is a very non-communicative aspect to the physical presence of this box -

THE COURT: Uh-huh.

MR. YURICK: - this dispenser, and that is what we're trying to regulate. We're not saying they can't -

THE COURT: If they were just regulating the box, it doesn't matter what is in the box, it is just the box you're regulating.

MR. YURICK: For instance, if there was nothing in the box, I think the Court could agree the box can't be there. There is no First Amendment protection there.

THE COURT: It is probably unrealistic, too. It would be sort of an absurd example because nobody would go to the expense of buying a box and putting it there.

[p. 100] MR. YURICK: Probably not. But the example, while it is absurd, puts the light on the uncommunicative nature of the box. I mean, there is a very definite uncommunicative nature to the box. Like a billboard -

THE COURT: A billboard is communicative.

MR. YURICK: But it also has a non-communicative -

THE COURT: It has a physical aspect to it.

MR. YURICK: It has a physical aspect which may interfere with the public's -

THE COURT: And that is what I'm concerned about here. Isn't that what you're concerned about, the physical aspect of the box interfering with the public safety and convenience?

MR. YURICK: We are. And we think that the -

THE COURT: And the real problem in the proliferation, as Mr. Young puts it, is because you want to give the newspapers a priority, is really what the City wants to do; and with the proliferation, if you let everybody else in, then the newspapers may get squeezed out.

MR. YURICK: They may very well, and I'm not sure the Constitution -

THE COURT: That is why I brought up the business about the taxicabs where you try to put a cap, the City puts a cap, because of public safety and convenience, on the number of taxicabs. How to handle it, they put a freeze on, and those [p. 101] that are first there can use them, and those that can only get them get a medalion or a license for the cab when one becomes available.

MR. YURICK: Well, I'm not -

THE COURT: And does that get into a little bit you granted the license to these folks, then you change the rules after you granted them the license and made their investment?



MR. YURICK: We think an employee of the City granted those improperly.

THE COURT: Whose fault is that?

MR. YURICK: Well, I guess it is the employee's fault.

THE COURT: No, I think it is the City's fault in a situation like that.

MR. YURICK: Well -

THE COURT: Let's assume we're concerned about proliferation so you put a limit on the quantity that can be at any street corner or in the city, however you want to use it. And how do you cut off folks that want to have it but haven't? You put a limit on, and those that are there have them, and as they decide to remove them or give up their location, if somebody else wants it, they can apply for it and get it. Wouldn't have anything to do - maybe two levels: maybe allow a certain level of numbers and something else at different locations. There are two or three other newspapers that the [p. 102] public's interested in and you have four corners at every intersection.

MR. YURICK: Well, I think to the extent that that raises the situation where we may have to grant a license or a permit to commercial publications to the disadvantage of a newspaper, that would be constitutionally impermissible. I mean, clearly the *Metromedia* case stands for the proposition that certainly you cannot give commercial speech any more protection than non-commercial speech. Non-commercial speech is clearly paramount in the First Amendment constitutional analysis.

THE COURT: That's a pretty interesting argument. Okay. Well, why don't we take our noon recess now and start up about quarter after 2:00 or so.

MR. MEZIBOV: Fine.

THE COURT: And we'll have an opportunity, because I presume you're going to make a motion at the end of his case -

MR. YURICK: Yes, Your Honor.

THE COURT: And we'll address some of those issues and have a chance to hear your witnesses. I think the best way to handle the case, even though your motion may be well-taken - although I'm not saying it is by a long shot - I'm going to hear your testimony anyhow so we have a complete record, so if whatever I rule, may rule, the Court of Appeals will have an opportunity to see what the testimony was and see what was done [p. 103] in the event I didn't do the right thing. All right.

MR. YURICK: Thank you, Your Honor.

THE COURT: See you all after lunch.

(At 11:40 a.m., the luncheon recess was taken.)

\* \* \*

GREGORY G. GOFF

[p. 106] A. Most real estate in the United States - and when I say "real estate," I'm speaking of residential real estate as opposed to commercial real estate - most residential real estate changes hands through professional real estate brokers. Most real estate brokers are members of boards of real estate organized by the community and most of these boards offer a service called the Multiple Listing Service which is probably the most powerful tool

for marketing real estate. It is a computer program that maintains all information on homes available in the given community. However, outside of the Multiple Listing Service, the real estate brokers themselves have a need to communicate with the community and the community has a need to receive that information, and the advertising vehicles available to them are predominantly the yard sign located in the front yard of the home for sale, the newspaper classified section, and publications such as *Harmon Homes*.

Q. Now, do you publish a magazine or a periodical, your company that is?

A. Yes.

Q. And what is the name of that magazine?

A. In Cincinnati it's referred to as *Harmon Cincinnati Homes*.

Q. I'm going to ask you to look at Exhibit 25, please. Mrs. Schaeffer has that.

(Clerk handing the exhibit to the witness.)

MR. MEZIBOV: Thank you.

[p. 107] Q. Could you identify for us, Mr. Goff, what has been marked as Trial Exhibit 25?

A. This is our publication, *Harmon Cincinnati Homes*.

THE COURT: What's it called again, Harmony [sic] -

THE WITNESS: *Cincinnati Homes*.

THE COURT: Okay.

Q. How often is that published?

A. It comes out every two weeks.

Q. And do you offer a similar publication for the other locations around the country in which you - in which you do business?

A. Yes. In some markets it is weekly, in some markets it is monthly, but most markets it is every two weeks.

Q. Could you tell us, Mr. Goff, what information is intended to be conveyed by that magazine?

A. Generally the reader is interested in determining the range and scope of real estate, residential estate, available in the community. The publication attempts to convey that in terms of both pictures and words.

Q. Now you've indicated that real estate is marketed by means other than magazines such as yours. You've indicated that newspapers also provide information concerning available residential properties, and there is a concept and a practice here which we know as the yard sign; is that correct?

A. Right, that's correct.

[p. 108] Q. What difference, if any, is there between your publication and the newspaper advertisement and the yard sign?

A. Well, the predominant difference between obviously the newspaper and the yard sign, or *Harmon Homes* and the yard sign, the yard sign, is only a point of information if you're willing to drive a while for long period of time to determine what is available. Obviously,

that is not generally an efficient way to learn about real estate. The difference between *Harmon Homes* and the newspaper is that the newspaper is a mass vehicle; that is to say, it reaches essentially everyone in the marketplace or a large percentage of the marketplace. But because of the number of copies that it circulated, it's very expensive to put a lot of information in the newspaper. So the service that *Harmon Homes* offers to the real estate professional and to the public in general is that because we only circulate enough copies to satisfy the needs of those people interested in real estate information, real estate professionals can place a great deal more information which manifests itself for most people in the choice, including photographs. It would not be feasible for West Shell or Sibcy Cline or any local organization to provide this volume of information in the newspaper to the public. It would be too expensive.

Q. How is the information which is contained in your particular magazine brought to your magazine for publication?

[p. 109] A. The area manager is responsible for visiting each of the real estate professionals at a predetermined time during the week. We collect the photographs and the copy and that is sent to one of our production facilities and laid out and published.

Q. Do you provide or do you charge a reader to obtain a copy of your publication?

A. No, all our publications are provided free of charge.

Q. Could you tell us how that particular *Homes Magazine* is distributed in the Cincinnati area?

A. We have four predominant vehicles of distribution: banks; grocery stores and other similar retail establishments; real estate offices themselves; and street boxes or newsracks.

Q. And what is the significance to you of being allowed to distribute your magazine via news boxes?

A. Well, outside of the obvious of having copies picked up out of the news box, our predominant competitor is the newspaper. Historically, people interested in real estate information relied on the newspaper as it was the only source of information. Many readers or potential readers may or may not be aware of the existence of our publication; they generally are aware of the existence of the newspaper. We believe that by positioning our newsracks alongside the newsracks for the newspaper, that as people go to the newspaper, they will become aware of our publication and, thus, we get the newspaper audience for our magazine.

[p. 110] Q. Let me back up because I neglected to ask you one question. You indicated in response to my question of what information is intended to be conveyed by your magazine that you do provide information about what residential properties are available for purchase; is that correct?

A. Yes.

Q. Is there other information which from time to time or on a regular basis is intended to be conveyed in your publication?



A. From time to time we do provide other articles as to financing choices, mortgages, tips on how to maximize your investment in real estate. These articles appear not on a regular basis but on an occasional basis.

Q. And what is the significance of that or the relationship of that to the other information you convey in your magazine?

A. Well, we think that the thing that people are most interested in seeing in the magazine is the pictures of the homes. So, we try to dedicate as much space as possible to that, but we think it is just an added service that rounds out the publication to provide the occasional articles. We find most people pick up at least five of these magazines in a row in five different editions during the time they are trying to become educated about real estate, and so these articles don't need to appear in every single edition, but during the course of the time they pick up the magazine, they will be exposed to the articles. And the feedback we get from the real estate [p. 111] professionals is the reader and the real estate professionals that participate in the magazine both appreciate the additional information.

Q. When was it, Mr. Goff, that Harmon determined it wished to distribute its publication in the Cincinnati area by means of newsracks?

A. Well, Harmon Publishing acquired the Cincinnati magazine from a previous publishing company. We have actually acquired quite a number of these publications. We have had as our distribution strategy the addition of the street boxes wherever we go, and we are currently -

we have placed these street boxes in over a hundred cities at this point.

Q. At the current time is your publication being distributed by means of news boxes in other cities?

A. Yes; as I say, approximately a hundred cities have received the street boxes and we have other street boxes warehoused prepared to go out into additional cities.

Q. Let me ask you to look at the exhibit book and turn to Trial Exhibit No. 5, if you would.

A. Okay. I have it.

Q. Are you familiar with that particular document?

A. Yes, I am.

Q. Would you tell us what that is, please?

A. This is a document from our division - Division Circulation Director located in Canton, Ohio requesting [p. 112] permission to place the boxes in Cincinnati.

Q. What is the date of that, please?

A. July 13, 1989.

Q. Is that No. 4 rather than No. 5 Trial Exhibit?

-THE COURT: It has a 5 on it.

MR. MEZIBOV: Look on the the -

THE WITNESS: I'm looking at No. 5.

THE COURT: What exhibit?

MR. MEZIBOV: Can I compare notes to make sure we're on the same wavelength?

THE COURT: Go right ahead.

(Mr. Mezibov consulting with the witness privately.)

Q. Let's start with No. 4, I think.

A. Okay.

Q. I confused you or you confused me.

A. Exhibit 4 is a letter from the same Mr. Harmelink to Mr. Young here in Cincinnati.

Q. That is dated July 13th, 1989; is that correct?

A. It is, yes.

Q. And now turn to Exhibit 5, please. Can you identify that for us, please?

A. Right. That's the Exhibit A to that same request of that's from Plaintiff's Exhibit 4.

Q. And would you turn to No. 6, please?

A. This details the locations where we wished to place the [p. 113] boxes.

Q. And is this an accurate listing of the locations at which Harmon has placed its news boxes?

A. To my knowledge it is, yes. I prepared this list myself.

Q. And would you turn to Plaintiff's Exhibit or Trial Exhibit 7, please?

A. This is a map where we have replicated the list on Exhibit 6.

Q. And this information, the information contained in Exhibit 6, the information contained in Exhibit 7, is required by Cincinnati regulations; is that correct?

A. To my knowledge, that's correct.

Q. And would you turn to No. 8, please? Could you tell us what that is?

A. That is a Certificate of Insurance indicating that we're covered for liability related to street boxes.

Q. And that, too, is required by Cincinnati regulation; is it?

A. Yes, it is.

Q. And you remain in compliance with that -

A. Yes.

Q. - with that prerequisite? Could you turn to the next exhibit, please, Exhibit 9?

A. Yes.

Q. Could you identify that for us, please?

[p. 114] A. This is the letter we received granting us permission to place the boxes.

Q. Now, since the time that your company received permission to place its publication in the news boxes on the City right-of-way, have you received any complaints from the City or anyone else concerning accidents or dangers posed by your news boxes?

A. No, we have not.

Q. Have you received any specific complaints concerning the appearance or the manner in which your news boxes are maintained?

A. Not to my knowledge.

Q. Would you turn to the next exhibit, please?

A. Ten?

Q. Yes.

A. Yes.

Q. Could you identify that for us, please?

A. This is a letter again sent to Mr. Harmelink indicating that we should remove the boxes.

Q. Now, was this the first time you or your company was advised that your publication and/or its newsrack was in violation of any City regulation?

A. Yes, it was the first time.

Q. Was it your understanding - strike that. What was your understanding of your ability to place [p. 115] newsracks on the City right-of-way back in July of 1989 when you submitted your application?

A. We asked if there were any specific codes. We were told that you had to apply for permit and that you had to, you know, adhere to certain questions of right-of-way; but outside of that, there were no specific regulations. We applied as instructed and received the letter that was mentioned in this previous exhibit.

Q. Were you told by anyone on behalf of the City that you would not receive permission to place your newsracks on the City right-of-way?

A. No, we were not.

Q. Were you told that the City intended to change its rules and regulations?

A. No, we were not.

Q. Would you turn to Plaintiff's Exhibit or Trial Exhibit 12, please?

A. Twelve?

Q. Yes. (Witness reading.)

A. Okay.

Q. Is that a letter from Mr. Rowe to Mr. Maggiotto?

A. Yes, it is.

Q. Would you tell us who Mr. Maggiotto is?

A. Mr. Maggiotto is our corporate counsel.

[p. 116] Q. And what was the substance of this particular letter?

A. Similar to the testimony given from the Learning or Discovery Center: they heard our appeal concerning our desire to remain on the street and refused to recognize our right to be on the street.

Q. Have you ever indicated to the City personally or through some other official of Harmon's that you were unwilling to work with any proposed regulation the City might have concerning the regulation of newsracks?

A. No, we have not - I have not done that.

Q. I'm going to ask you to turn to Trial Exhibit Number 3, please. Now this purports to be a proposed



regulation of the City of Cincinnati which is dated July 14th, 1990. Are you familiar with this proposed regulation?

A. I have read through it.

Q. And are you satisfied that you're familiar with the -

A. I am familiar.

Q. - the provisions contained in that -

A. Yes, I am.

Q. document? Are there - is there any particular provision or any particular requirement contained in this document which Harmon would be unable to comply with?

A. No, there is not.

Q. Is there a particular provision or requirement in this [p. 117] document which, if adopted, Harmon would be unwilling to comply with?

A. No, there is not.

Q. I'm going to ask you to look at the photographs which have been marked for evidence.

(Clerk handing the witness the exhibit.)

Q. And more particularly I'm going to ask you to look at the photograph marked Exhibit 33C.

A. I have it.

Q. And could you tell us what's depicted in that photograph?

A. Three newsracks: *Business Courier*; *The Cincinnati Post*; and *Harmon Homes* newsrack.

Q. Now with particular regard to the Harmon newsrack, is that the newsrack which Harmon has utilized throughout the City?

A. Yes, it is.

Q. At approximately how many locations is it?

A. Twenty-nine, to my recollection.

Q. And is that the newsrack that the City - that Harmon uses in other locations throughout the country?

A. Yes, in almost all instances. However, there are - there have been occasions where the city has requested a different fixture and we have complied in all cases where the city has made a specific request.

Q. Through what other structures or device does Harmon distribute its publication in other cities?

[p. 118] A. Are you speaking in terms of outside newsrack or just in general?

Q. Outsides newsrack, yes.

A. The most well-known example is San Francisco, which the way San Francisco regulates the racks is that the city has provided a certain number of racks and they - for a fee - ask the publishers to pay a fee to be in those racks that is provided; a standard look, it is for esthetic reasons. San Francisco is very interested in the esthetics of the city, and they got to the point they didn't like all the different racks on the street, so they have provided a common rack and we pay to be in that rack.

Q. What kind of publications are distributed through that rack in San Francisco?

A. The daily newspaper, *The Wall Street Journal*, our publication, other publications similar to ours.

Q. So you, in effect, share a common situs in a common device by which to distribute your publications along with other types of publications?

A. Yes, it is. And San Francisco is able to eliminate the question of racks being chained to public property, et cetera

A. All these common - they call them "kiosks" - they are bolted directly to the sidewalk.

Q. Have either you or has either - strike that. Has anyone on behalf of Harmon ever indicated to the City [p. 119] of Cincinnati that they would refuse to distribute their newsracks by means of any other device such as that contained in Exhibit 33?

A. No, we would willingly put out any type of box the City would specify.

Q. What would the impact on Harmon be - strike that. Could you describe what impact there would be if - on Harmon and on others if you were unable to continue to use newsracks in Cincinnati to distribute your publication?

A. Well, it is our belief that that is a significant percentage of the population that is no longer exposed to the publication through its predominant historical distribution point, namely banks. Historically, the Cincinnati magazine was distributed exclusively in banks which was

fine prior to the advent of the automatic teller. With the advent of the automatic teller, we don't frequent banks anymore, so we have an entire professional community that works Downtown in Cincinnati that is very interested in the information contained in the *Homes Magazine*. We believe that the street vending box allows us to reach that audience, and the real estate professionals that are in the magazine have indicated to us that they share that belief. West Shell Realty, the largest user of our magazine, as a matter of fact, phoned our direct manager just yesterday to re-emphasize their interest in Cincinnati Downtown news boxes.

[p. 120] Q. We might have touched on this earlier, but is the information contained in your publication identical to that which is contained in *The Cincinnati Enquirer*, for example?

A. No, it's not.

Q. In what way is it different?

A. Well, the predominant difference is the variety of listings that are contained in the *Homes Magazine*, the specific homes that are contained in the *Homes Magazine*, and most importantly the fact that each listing in the *Homes Magazine* contains a photograph. If you go through *The Cincinnati Enquirer*, you may find several three-bedroom homes mentioned in West Chester with tremendous differences in price, and it may be somewhat difficult for someone who is trying to become educated in real estate in West Chester to understand why there is this range. But with the *Homes Magazine*, you're assisted by the photo and it is pretty easy to see oh, this house is, you know, much nicer or larger; despite the fact it is still a

three-bedroom, it is nicer and larger, thus the difference in the price. So I would say the predominant difference between us and *The Enquirer* is the addition of the photo. Again, I haven't gone through *The Enquirer*, but I would venture to guess there may be a larger selection and greater breadth of information about homes in our magazine than in *The Enquirer*.

Q. In terms of quality and quantity of information which a reader may have about real estate, what difference then would [p. 121] there be between receiving your particular publication and simply *The Enquirer's*?

A. Well, as I said, I believe it comes down to the photographs. To use the cliché, a picture is worth a thousand words. And if I'm trying to visualize the type of real estate I'm interested in or get a better understanding of what types of homes are in a given community, those pictures speak very loudly to me as to what the community is like.

Q. You've indicated in addition to banks at one time you also distributed to your your - publication or your attempt through grocery store outlets; is that correct?

A. That's correct.

Q. Are there any grocery store outlets or chains in the Greater Cincinnati area from which you are unable to distribute your publication?

A. Yes, Kroger.

Q. And how many outlets then are you not permitted to utilize, if you know?

A. I don't know the number of outlets but I know that Kroger's market share is somewhere around 50 percent, so that's a significant barrier for us.

Q. And again, if you were unable to distribute your publication by means of newsrack on the City right-of-way, what impact would that have on your business?

A. We think it could be potentially significant given that [p. 122] some of our largest revenue source, for example, is West Shell Real Estate and they, for one, have come forward and said specifically that the Downtown vending boxes are an important reason why they utilize our product.

Q. Mr. Goff, have you been contacted by the City of Cincinnati with regard to their proposed regulations of newsracks which I have shown you as Exhibit 3?

A. I was not personally contacted; the company, however, has been contacted.

Q. In what form and for what purpose?

A. I believe Lou Maggiotto has been in communication with them to understand the background of why we're not being permitted to stay on the streets.

Q. It's accurate that Harmon's never been asked to participate in the preparation or development -

A. No.

Q. - of the proposal; is that correct?

A. No; no, we have not.

Q. You have been specifically excluded from those conversations?



A. This is the case, yes.

MR. MEZIBOV: Thank you, Mr. Goff. I have no further questions, Your Honor.

THE COURT: Okay. You may proceed.

MR. YURICK: Thank you, Your Honor.

[p. 123] CROSS-EXAMINATION

BY MR. YURICK:

Q. Mr. Goff, I just have a few questions. You, again, are not claiming that you publish a newspaper; is that correct?

A. I would not use that word, no.

Q. Clearly, that is not a newspaper then in your understanding?

A. I believe most people would refer to it as a magazine.

Q. Okay. And again the purpose of your magazine is to advertise real estate listings; isn't that correct?

A. To communicate what's available in the way of real estate, yes.

Q. It's communication but it's - you're communicating - you have a picture of a house, you have a little description of the house, and then you have either a price or who to contact to get the price; is that correct?

A. That's correct.

Q. Okay. And that - other than that, there is really no significant other communication in that magazine; isn't that correct?

A. Outside of the occasional article that does exist.

Q. Okay. But you stated that - how long - how much space or how much - how much of your magazine is dedicated to these articles?

A. Four pages at most.

[p. 124] Q. When they appear?

A. When they appear, that's correct.

Q. And how often would you say they appear?

A. I'd say it is more likely that a publication would have an article than not have an article, so in excess of 50 percent of the time but less than a hundred percent.

Q. And again you're a for-profit corporation; is that correct?

A. Yes, we are.

Q. Okay. Basically, real estate companies contact you, pay you to list their homes in their magazines and you do that; is that correct?

A. That's correct.

Q. You're published every two weeks. You don't have articles in there about current events or articles referring to political happenings or -

A. Not political happenings; however, we do have articles concerning trends in mortgage rates, et cetera, that could be considered by some to be a current event.

Q. Okay. You said that you had three vehicles of distribution, is that correct, other than these boxes that you put on the -

A. Right.

Q. - City right-of-way? You also distribute through banks?

[p. 125] A. We distribute - actually, there is an additional way that I forgot to mention, but our predominant distribution is banks and grocery stores. We do also distribute in the real estate offices themselves, although that is predominantly for the benefit of the professional rather than the public, the newsrack. We also do have an 800-number service for people that are moving to Cincinnati from outside locations and they can call.

Q. Okay. How many - in terms of your current circulation, what percentage of your publication is distributed through newsracks, if you know?

A. It's approximately, excluding those copies that go to the realtor, it's approximately 15 percent of every -

Q. Fifteen percent?

A. That's correct.

Q. So 85 percent of your publication circulation is through these alternative means; is that correct?

A. That's correct.

Q. Did you have to pay a fee to the City of Cincinnati for permission to place these dispensing devices on the public right-of-way?

A. We would be willing to but none has been requested.

Q. To your knowledge, has anyone at any time interfered with, confiscated, damaged, et cetera, any member of the City of Cincinnati, to your boxes?

[p. 126] A. No, not to my knowledge.

Q. Again, you did have an administrative hearing before a board; is that correct?

A. Yes, we did.

Q. Okay. And you stated that - strike that.

MR. YURICK: Could I have a moment to confer with co-counsel?

THE COURT: Yes, you may.

MR. YURICK: Thank you, Your Honor. (Mr. Yurick and his colleague conferred privately.)

MR. YURICK: I have no further questions of the witness, Your Honor.

THE COURT: All right. Thank you, Mr. Yurick. Anything on redirect?

MR. MEZIBOV: Just one or two questions, Your Honor.

#### REDIRECT EXAMINATION

BY MR. MEZIBOV:

Q. Mr. Goff, do you require the permission of a bank to distribute your magazine?

A. Yes, we do.

Q. And what about from a grocery store?

A. Same thing; yes, we do.

Q. So if these sources say no to you, you are without the ability to distribute your magazines at those locations?

A. That's correct.

[p. 127] MR. YURICK: I'd object. I would just object to the question as -

THE COURT: What was the question? It was a leading question, as I recall.

Q. What would be the result of a grocery chain or store or a bank advising you, you could not use their premises as a location from which to distribute your magazine?

MR. YURICK: Again, I'll object to the question as being speculative, Your Honor.

THE COURT: Can you answer without speculating?

A. Well, in the absence of banks or grocery stores, we would go to other retail establishments or, you know - there is a risk that there would not be a suitable alternative, but we would attempt to find one.

MR. MEZIBOV: That's all the questions I have, Your Honor. Thank you.

THE COURT: Thank you. You may step down. (Witness excused.)

THE COURT: All right. Do you have anything else?

MR. MEZIBOV: Your Honor, we have no further testimony to present. I would simply at this time offer our exhibits.

THE COURT: Okay. The exhibits are all admitted.

MR. MEZIBOV: And I would also, Your Honor, again offer into evidence pursuant to Rule 32 the depositions of Mr. [p. 128] Young, Mr. Mann, and Mr. Richardson which were taken on June 21st of this year which have been filed with this court.

THE COURT: All right. They're admitted.

MR. MEZIBOV: Thank you, Your Honor.

(Depositions of Messrs. Young, Mann and Richardson were admitted.)

MR. YURICK: Your Honor, at this point I would like to make a motion for directed verdict.

THE COURT: You may do so.

MR. YURICK: Your Honor, I'd like to address the motion for directed verdict to the plaintiffs' claims sort of in backwards order.

The procedural due process claim, I believe the plaintiff has not proven. He has failed to show that there is - first of all, I think he has failed to show there has been any taking; then again, I think there was an administrative appeal procedure and I think that the plaintiff hasn't shown that that appeal proceeding was so wanting in



fairness or objectivity that it would constitute a violation of its procedural due process claims. I think the testimony was that there was an administrative hearing provided for, the plaintiff was notified of the administrative hearing, and, both plaintiffs, and those hearings were held; therefore, we would ask that the Court grant the City's motion for directed verdict as to the procedural due process claim.

[p. 129] On the First Amendment and Fourteenth Amendment claim, again I think that plaintiff has failed to show that the City's regulatory scheme taken as a whole, as mentioned in my trial brief, lacks or doesn't pass constitutional muster under the applicable commercial speech case law. I think the testimony from both of the plaintiffs has been that their publications are commercial in nature. I think that the record shows that they're purely commercial publications. The test in the United States for the constitutionality on a legislative restriction of commercial speech is that it's a four-part test and the test is set out in *Central Hudson Gas & Electric Corporation versus the Public Service Commission*; that's 477 [sic] U.S. 555, 1990. I think that case is in both the plaintiffs' brief and in our - the defendant's brief.

A government restriction on commercial speech is valid if assuming the speech is - concerns lawful activity and is not misleading, and we're not questioning that; the regulation directly advances a substantial government interest, and the regulation reaches no further than necessary to accomplish that interest.

Now as to the question that the Court asked before the adjournment, that test sort of sounds like a least

restrictive means test. But the way the test was applied, particularly in the *Metromedia* case, it is clear it is not a least restrictive means test and, in fact, in *Board of Trustees* [p. 130] of *Southern University of New York versus Fox*, which is 492 U.S. - no page number on the official reporter - 109 Supreme Court 3028, 106, Lawyers Edition 2d, 388, 1989, and this is also mentioned in the plaintiffs' brief, "... restrictions upon commercial speech need not employ the 'least restrictive means' to achieve the identified governmental interest. It is sufficient if the regulations are not 'burden substantially more speech than is necessary.' "

THE COURT: Let me ask you a question. If you use this new regulation, proposed regulation drafted, I presume, in June of 1990, Plaintiffs' Exhibit 3, it would accomplish everything you want to accomplish. Wouldn't it?

MR. YURICK: No. As a matter of fact, the only way we could accomplish everything we want to accomplish is to ban all these boxes of both newspapers and commercial publication.

THE COURT: No -

MR. YURICK: I'm sorry, Your Honor.

THE COURT: This regulation permits news boxes but tells where it can be located, the safety and convenience and proliferation concerns of Mr. Young.

MR. YURICK: As an accommodation to an admittedly higher First Amendment claim of a non-commercial publication. But when you have a commercial publication -

THE COURT: It doesn't talk about content at all; just talks about the physical size and location of these [p. 131] things.

MR. YURICK: Well, it's our position that the Legislature, and it's well - I think it is well-pointed out in the case law that the Legislature can make a distinction and, in fact, has to make distinction between commercial and non-commercial speech.

THE COURT: Why does it have to make any distinction at all? The regulation you're drafting will probably be adopted. It doesn't talk anything about speech.

MR. YURICK: If we were to apply that - assuming that that's ever passed into law -

THE COURT: Okay.

MR. YURICK: -if we were ever to apply that test to both commercial and non-commercial speech evenly, it would be clearly unconstitutional under the *Metromedia* case as putting commercial speech on a par with non-commercial speech. And this - this is an interesting -

THE COURT: Sounds like a bootstrap argument to me.

MR. YURICK: Please?

THE COURT: It sounds like a bootstrap argument to me. It doesn't sound right. It sounds like you're trying to constitutionalize something in a negative fashion. What we're talking about here, you don't have to restrain expression at all.

MR. YURICK: With -

[p. 132] THE COURT: You're not restraining expression at all. You're saying these boxes are permitted on the streets so long as they don't impede traffic, impede access, and they are so proliferated that they create a nuisance, in effect. It doesn't mean whatever is being purveyed in them.

MR. YURICK: Again, Your Honor, I think that - the person who has been trying to bootstrap here in my opinion is the plaintiff. He has been trying to put his clearly commercial publications on a par with non-commercial publications and he may not do it constitutionally. There is a significant difference in the jurisprudence between commercial speech and non-commercial speech. Non-commercial speech in the traditional public forum is clearly - clearly has a paramount interest to any interest that the government might have in safety or esthetics in terms of a less restrictive you would have to apply the less restrictive means test. But we do not have to apply the less restrictive means test in an area where we are only seeking to control and legislate commercial speech. It's clear from the case law. And that third part of that test saying that it reaches no further than necessary to accomplish the interest, they're talking about the legislative interest that is being sought - that is sought to be promoted by the legislation, in this case safety and esthetics. In fact, if you read the *Metromedia* case, they bring it out we are actually legislating less speech than is necessary to accomplish our [p. 133] goal because we are recognizing the first - the paramount First Amendment of the public forum in the newspapers. It



may sound like a bootstrap argument, Your Honor. I think -

THE COURT: What about when *The Saturday Evening Post* publishers and several other magazine publishers decide they want to start purveying their magazines using street boxes?

MR. YURICK: That is precisely - well, as to some - as to some of those, *Saturday Evening Post* or some similar news magazine, they probably do.

THE COURT: You know, your statute says that something is a commercial handbill that contains the same thing that you say that a newspaper contains.

MR. YURICK: Well, I was going to - going to address that a little later in my argument. But to the extent there is a facial challenge to this ordinance, since only commercial speech is sought to be regulated, under *Bates versus the State Bar of Arizona* - and I have other cases on point and they've been - that case has been specifically upheld by the Sixth Circuit that overbreadth and the doctrine of overbreadth allowing a facial challenge to an ordinance does not apply in the area of commercial speech. It's clear we're only seeking to regulate their commercial speech. And as applied and the statutory scheme as has been applied and as is written clearly makes exceptions for non-commercial speech, non-commercial speech like newspapers which may incidentally contain some [p. 134] commercial speech. I mean, there is a longstanding practice of allowing newspapers to be in vending boxes and there is no - we're not seeking to restrict their access. I mean, this commercial handbill legislation isn't being applied to newspapers. So

to the extent there is an overbreadth argument and a facial challenge, that clearly doesn't apply under *Bates versus the State Bar of California* [sic].

THE COURT: Okay.

MR. YURICK: I think the ordinances taken as a whole don't fall afoul of the constitutional protections that are afforded by the First Amendment and the Fourteenth Amendment and as applied through the case law, and we would ask for - that the motion for directed verdict on that claim be awarded as well or granted as well, excuse me. Thank you.

THE COURT: Thank you. Mr. Mezibov?

MR. MEZIBOV: Thank you, Your Honor. First, Your Honor, let me state that all of the arguments I would have in order to meet -

THE COURT: Let's deal with the procedural due process first.

MR. MEZIBOV: Fine, Your Honor. With regard to the argument concerning procedural due process, it's important to point out, and I'm sure the Court is fully aware, that the procedural due process means an opportunity to be heard in a meaningful manner. We have difficulty with seeing how the City

\* \* \*

[p. 145] hear your evidence. I would like to take a short break and then we'll start with your evidence, if you will.

MR. YURICK: Thank you, Your Honor.

MR. MEZIBOV: Thank you, Your Honor.



(At 3:30 p.m., a short recess was taken.)

\* \* \*

(3:46 p.m.)

THE COURT: You may proceed, gentlemen.

MR. YURICK: Your Honor, my first witness will be Mr. Bob Richardson.

THE COURT: Mr. Richardson.

THE CLERK: You've already been sworn.

THE COURT: You may proceed.

ROBERT H. RICHARDSON

a witness herein, having previously been sworn, testified as follows:

#### DIRECT EXAMINATION

BY MR. YURICK:

Q. Mr. Richardson, I believe you have told the Court that you're the City Architect; is that correct?

A. Principle City Architect, yes.

Q. Okay. What do you do as a City Architect? What are your principle duties?

A. We're involved in many different things, primarily the design and upkeep of all city buildings, where there are 65-some, approximately 65. We're also involved in design and [p. 146] implementation of any portion of things built with public money; for instance, in the Downtown it is the public right-of-ways, streetscapes, the

skywalk system, sometimes the public-supporting projects like garages and open space, whatever.

THE COURT: Are you still the City wharfmaster?

THE WITNESS: No.

THE COURT: Did they take that job away from you?

THE WITNESS: I think the Recreation Department has that now. They take care of Sawyer Point and other things.

Q. Sir, when you say you're responsible for designing streetscapes, what in common parlance is the "streetscape?"

A. It is the public right-of-way and sidewalk area that surrounds the development project or a block of buildings Downtown. It encompasses the sidewalk, paving, the lighting system, the landscaping and/or the trees, and any street furniture and hardware that also is along the City right-of-way.

Q. So all these various elements that compose the public right-of-way are coordinated and designed through your office?

A. The existing ones obviously are not, but any new ones built we are involved in, yes.

Q. And you make conscious design additions with regard to these public ways and -

A. For the Downtown, basically there's a design plan called [p. 147] the 2000 Plan which was originally

published in 1982 which for the most part set a standard for the type of public right-of-way and design and environment, and it's concentrating on what is called the "core area," the original twelve-block area of Downtown that has a full paving system with a defined structural grid and brick paving as well as what we call the mall traffic control and lighting system, the tripod holes, and the traffic boom that incorporates the traffic signals and traffic signs and everything from fire boxes to trash cans and whatnot. Outside the immediate core area, or that twelve-block area, there is a fringe treatment which is a lesser treatment that is not paving the full sidewalk but simply paving a collector strip along the edge and using a monotube or single pole instead of a tripod, or three poles. That is the basic plan for Downtown.

Q. And in designing the streetscape system, are esthetics a consideration?

A. Yes, sir.

Q. Okay. Why do you consider - why does your office consider it necessary to consider esthetics and why do they do streetscapes?

A. Well, streetscapes in general are done, first of all, to improve the appearance of Downtown. It becomes sort of the front door to visitors and tourists, and business people stop or visit Downtown. It is the livingroom of the City. It also [p. 148] is done in a way to support private development. It is the City's leverage, esthetics, of producing the finished product by supporting what they can do in the public right-of-way and pay for that along with the skywalk system to hopefully leverage private development and also to maintain the existing people that are

Downtown and the other neighborhood business districts as well.

Q. So your office considered it important in keeping and attracting private investment to design these streetscapes with esthetics in mind; is that correct?

A. Yes, sir. Cincinnati being a northern city, we are competing with a lot of other cities our size and that is one of the techniques used to attempt to attract as much development as possible and keep the development we do have, increase jobs and increase the tax budget.

Q. Now you're familiar generally with dispensing devices that dispense various publications; is that correct?

A. Yes, sir.

Q. Okay. Do those in general - do they detract from the effectiveness of your streetscaping plans?

A. Yes, they do. Currently, for the most part, the streetscapes are designed with - starting with the lighting system and where you can put foundations and where functionally lights are required and where traffic signals are required and within incrementing spacing of parking meters and things, we're [p. 149] trying to incorporate all the elements in one location instead of having a whole series of Metro signs and parking signs and whatnot. These structures incorporate several elements in place and it sort of works together. If you start with a given block, which is 400 feet, we're working with car increments of meters and parking spaces and loading zones and whatnot, and then the spacing of the light poles, and

then the sidewalk pattern articulates usually the buildings, structural bay pattern and it picks up the terms used in the newer buildings, the granite border strips and inch strips, and then trees are placed with some regular pattern but also within the framework of where they can go concerning the bays and other things involved in Downtown.

Q. And how do these dispensing devices - how exactly are they -

A. They are sort of the one element that is not designed in the system. Everything, as I said, from parking signs and parking meters and trash receptacles and transformer boxes and fire boxes are incorporated in the whole esthetics problem and these boxes are randomly placed where they want them, attached to the poles, causing rust and causing problems with crosswalks and handicap ramps. It is one element that does not fit into the system. Primarily we intended to have what we call a "collector strip" which is three to four feet along the curb where the utilities run, various water, gas utilities and [p. 150] whatnot.

Q. And are you familiar with the amount of time, effort and money that goes into designing a streetscape generally?

A. Yes, sir.

Q. Okay.

A. In terms of money, I think as a ballpark figure, for the full treatment Downtown, may run in the range of 270,000- to \$300,000 for one single block face on one side of the street. And if you're doing both sides of the street,

obviously it is doubled that, so it is up to 5- or \$600,000 for one block on both sides of the street. And as far as time, it's -

THE COURT: That's for the streetscape?

THE WITNESS: Yes. Yes, sir.

A. As far as time, it's probably approximately two to three months for design and probably four to five months for construction, so you're talking eight to ten months total time.

Q. And again, these boxes, they detract from that streetscape plan in your opinion?

A. They are again the one element that is not regulated or articulated with the rest of the system.

Q. So they do esthetically detract?

A. Yes, they do.

MR. YURICK: I have no further questions at this time.

THE COURT: Thank you. You'd be satisfied that the [p. 151] administrative regulations, drafted on June 14th, 1990, were adopted by the City to regulate these boxes; would you not?

THE WITNESS: I would for the non-commercial dispenser.

THE COURT: No, not what is in the boxes but just the dispensing devices.



THE WITNESS: We were working with a group that was non-commercial vendors. If we go to commercial, it adds a whole other element. And we talked about proliferation; there were four other companies.

THE COURT: What were the things that the commercial people wanted?

THE WITNESS: It is the amount of the boxes. I think there were four companies now that were deemed commercial that were not part of this group, they were out on the street now, and if this is ruled legal, I think there may be many more companies that feel they could now in effect be in the public right-of-way.

THE COURT: Any reason why you can't put a limit? There is only so much space Downtown.

THE WITNESS: Right now we have nine or ten commercial papers Downtown and there were four that were deemed to be commercial, so that is up to fourteen all ready. And if we had more, then those guidelines, I think, would have to be redrafted to consider the numbers because -

[p. 152] THE COURT: Suppose you did draft the guidelines and, forgetting about whether it is commercial or non-commercial, but you'd only allow so many boxes on the street. You only allow so many parking spaces on the street.

THE WITNESS: I think even from the pictures this morning it depicted our guidelines call for a maximum of six in one location. We have some like that already, so obviously if you add more, then it's going to become first come, first serve, and you may preclude the

normal newspapers from being in prime locations. We're dealing with an area of 13-foot sidewalks in a very concentrated area of the Downtown that's -

THE COURT: Newspapers are already there; aren't they?

THE WITNESS: Yes, they are.

THE COURT: So isn't it sort of first come, first serve?

THE WITNESS: Well, the way it's working now, the committee is agreeing collectively how the order of each row goes.

THE COURT: Except you're leaving the commercial folks out.

THE WITNESS: Yes, sir. I'm saying then proliferation -

THE COURT: You're going around in circles here.

THE WITNESS: Well, I think the numbers will increase [p. 153] tremendously if the commercial folks are included; therefore, the guidelines have to be re-thought in terms of numbers and there'll have to be some thinking to decide where each one goes.

THE COURT: You heard somebody testify about how they do it out in San Francisco. Have you investigated that?

THE WITNESS: I have seen those, yes.

THE COURT: What do you think of their system?

THE WITNESS: I think it works pretty well. In fact, that was our original intention when we did a streetscape, to provide a series of boxes that would be paid for by the public money to do that. At this point -

THE COURT: And then rent it to the people who wanted to use it?

THE WITNESS: Yes.

THE COURT: That would sort of take care of financing, I guess, the capital construction of the City. But the rent -

THE WITNESS: Right.

THE COURT: - would be the cost of the capital construction plus interest.

THE WITNESS: But that was not accepted in concept by the newspaper companies at this point, so it's been dropped as a concept and so that is why it's working the way it is.

THE COURT: Are the newspaper companies trying to [p. 154] keep them off?

THE WITNESS: No, I think they are working with everybody out there to achieve something everybody can agree on. But yes, I'm familiar with San Francisco and that's something we had investigated. The other issue is, again, through the City Engineer's Office, is the charging fees as to how many people they would need to regulate. And when you get into fees, it is a whole other issue.

THE COURT: Uh-huh, okay.

MR. MEZIBOV: A couple questions, Your Honor -

THE COURT: Go ahead.

MR. MEZIBOV: - if I might.

THE COURT: Sure.

#### CROSS-EXAMINATION

BY MR. MEZIBOV:

Q. In answer to Mr. Yurick's question, is it accurate that you believe that newsracks detract from the City's streetscape in terms of esthetics?

A. As they currently exist in sporadic pattern just grouped wherever they want to be Downtown, yes.

Q. So is your testimony that generically any newsrack -

A. Not in itself, no.

THE COURT: You aren't concerned with what's inside it.

THE WITNESS: No.

THE COURT: You're concerned with the appearance of the box.

THE WITNESS: And the appearance of all the boxes collectively. I'm not saying a box is unattractive, no. Collectively, the way they are sporadically attached to wherever they want to be is unattractive.

Q. So if Discovery Center or Harmon would agree to allow their publications to be dispensed from a newsrack which you find to be esthetically pleasing and one which is allowed under a City regulatory scheme, you would have no problem from an esthetic standpoint as to their publication out there; would you?

A. Not in terms of the box design, but I would have a problem with the proliferation because we would end up with a lot more boxes than we have to deal with and the system would have to be changed to deal with that.

Q. Mr. Richardson, are you aware of any applicant seeking permission from the City to put a newsrack out on the City right-of-way who has been denied?

A. No, I'm not. I think that at this point I think it's been at least eighteen years since they have had this, and I think if that's changed, therefore, people will become aware they can be in the public right-of-way which they were not aware of now and it is advertising the public right-of-way. And if they were aware they cannot do that and if they are deemed that they [p. 156] can, I think many more may apply.

Q. Your testimony is, as I understand it, that if Discovery Center and Harmon are allowed to keep their newsracks out on the public right-of-way, that could send a message to everyone and anyone they could have newsracks out there?

A. It possibly could, yes.

Q. But notwithstanding the fact they have been out there a year, not one person, not one company has

applied for City permission, isn't that correct, who's been rejected?

A. Again, we don't deal with the permit process. I am not totally sure of that; but I don't know of any.

Q. You said you are concerned with proliferation. I want to know whether you're aware of any entities, businesses or individuals who have come to you seeking permission of the City to place their -

A. The City Engineer's Office again honchos the permit process. I do not. So no, I'm not aware of that; but there is existing four companies that had commercial boxes in the right-of-way now Downtown.

Q. And do I understand correctly that your proposed regulation, which is Trial Exhibit 3, would continue to permit newsracks to be out on the streetscape; is that correct?

A. Yes.

Q. So the City in no way contemplates doing away with -

A. No.

[p. 157] Q. with newsracks because it offends the City's esthetics -

A. No.

Q. - or City's safety?

A. We want to organize them like the other elements on the street.



Q. Do I understand from your testimony you always had a concern about accomplishing uniformity among the various news boxes?

A. I think you need a certain degree of uniformity in the nature that they don't block visual things for safety issues from a police standpoint and they don't block crosswalks and handicap ramps as we said this morning. On the other hand, you need a certain vitality. We need activity Downtown and activity at night, so there is something to say about the color variations and that kind of thing, too.

Q. In fact, the City has gone to the various publishers who have newsracks out on the City right-of-way now such as *The Enquirer* and *The Post* and you've made some suggestions to those people which you would like to incorporate into your streetscape and they have rejected them; have they not?

A. I think starting in 1979 we proposed what was talked about before, that we custom design a box that the newspapers would simply slip their papers into a box provided by the City.

Q. And that proposal was rejected by the newspapers?

[p. 158] A. Yes.

Q. Which newspapers?

A. That's sometime ago. It was again a collective group of all of them.

Q. And because the newspapers were unhappy with that scheme, you abandoned it?

A. Well, this issue has obviously been one of controversy from the beginning and I think we were trying to please everybody as a compromise position.

Q. You were trying to please the newspapers; weren't you?

A. We were also trying to please the City officials as well and the spirit of development Downtown.

Q. But it's accurate that when suggestions have been made by the City to the newspapers about accomplishing uniformity so as to satisfy the City's concerns about safety and esthetics, some of those recommendations which have involved the use of a uniform newsrack have been rejected by the newspapers?

A. Yes, and I think they also dropped some of their concerns and I think it's been a compromise.

Q. Is it fair to say the regulatory scheme of the City is in part a partnership with the newspapers -

A. Yes, sir.

Q. - of the City?

A. Definitely.

Q. So who is responsible for the operation and development of [p. 159] this regulatory scheme, the newspapers or the City in this town?

MR. YURICK: Objection.

THE COURT: Overruled. I think the witness is being sort of led down the path. You're not used to being in court.

A. Who is responsible, the administration of it, is the City Building Engineers of the Public Works Department.

Q. But they do consult from time to time with the newspapers about these regulations?

A. I would assume.

MR. MEZIBOV: That's all I have, Your Honor.

THE COURT: Thank you.

MR. YURICK: I have nothing further of this witness.

THE COURT: Thank you, Mr. Richardson.

(Witness excused.)

MR. YURICK: Mr. Young would be my next witness, Your Honor.

THE CLERK: You're still under oath.

THE COURT: Proceed.

THOMAS E. YOUNG

a witness herein, having previously been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. YURICK:

Q. Mr. Young, I think you already testified you're the City [p. 160] Engineer; isn't that correct?

A. That's correct.

Q. And what are your responsibilities and the responsibilities of your office with regard to public right-of-ways as a City Engineer?

THE COURT: Let me ask this question. How does the City Engineer relate and the City Architect relate to the Department of Public Works?

THE WITNESS: The Engineering Division which I head and the Architecture and Facility Management Division, of which Mr. Richardson is a senior official, are both divisions in the Department of Public Works.

THE COURT: Okay.

Q. Sir, let me ask you again: How does your office - how do the responsibilities of your office coincide with or how do they relate to the placement of newsracks in the public right-of-way? What are your office's concerns?

A. Well, our office has the basic function for design and regulation of use of the public right-of-way including streets, sidewalks, bridges, other structures within the right-of-way.

Q. And in your opinion, do these - do newsracks generally, or dispensing devices, whatever, do they detract from the safety of the public right-of-way?

A. They can if they are improperly positioned and if there are so many of them that, at a given location, that it forces [p. 161] improper positioning of them.

Q. And how specifically do they detract or can they detract from the safety of the public right-of-way?

A. At many locations they have been placed within or too close to crosswalks so that they could be bumped by pedestrians in the normal movement. In some cases they have obstructed the use of handicap ramps for wheelchair-bound persons. In some cases they have been positioned so that – and this doesn't apply to intersections with traffic signals but at some other locations where they could actually obstruct the visibility of motorists and pedestrians, either the pedestrian – either way, and particularly small pedestrians, children. There are many ways with which they can adversely effect safety.

Q. Do they in any way detract from the width or the adequacy of the width of the public right-of-way?

A. Again, if they are improperly placed, they can restrict the use of the sidewalk. As Mr. Richardson stated, that interference is minimized if they are placed in the area adjacent to the curb which is normally occupied by light poles, fire plugs, traffic signs and other utility and public functions.

Q. Okay. Going back to the discussion of your approval of – you approved Harmon's application to place these dispensing devices on the public right-of-way; is that correct?

A. Yes.

\* \* \*

[p. 163] THE COURT: And you asked Mr. Young –

MR. YURICK: I asked him if he allowed or attempted to allow both of the publications an opportunity to be heard.

THE COURT: Overruled. You may answer.

A. Yes, they did have every opportunity to present their case.

Q. Okay. Did you, as a member of the Board, attempt to approach the appeal with an open mind?

A. Yes.

MR. YURICK: I don't have any further questions of this witness at this time.

THE COURT: You may cross-examine.

#### CROSS-EXAMINATION

BY MR. MEZIBOV:

Q. You've indicated, have you not, Mr. Young, in response to Mr. Yurick's questions, that newsracks may compromise or detract the City's interest with regard to safety if they are positioned improperly; is that correct?

A. Yes.

Q. The City has the ability to determine where a particular newsrack is to be positioned; isn't that correct?

A. In the sense of being able to reject a permit or to require, even after permit is issued, to require its relocation if it proves to be unsafe, yes.

Q. So, therefore, newsracks, insofar as positioning concerns [p. 164] are involved, can be regulated by the City; is that correct?

A. Yes.

Q. As a matter of fact, the City asks for site locations before approving a permit; isn't that correct?



A. At least the location by corner. We have accepted lists rather than individual site plans in some cases.

Q. And you also indicated a problem could develop if there were too many newsracks at a given location; is that correct?

A. That's correct.

Q. And would you agree with me that the City has the ability to regulate the number of newsracks which are located at a particular site?

A. I don't know that I'm legally competent to answer that question.

Q. As City Engineer, have you ever been asked to involve yourself in a decision as to how many newsracks should or could be located at a particular location?

A. I have and my staff have been involved in the discussion that Mr. Richardson has described with the various newspapers at which there apparently is, and I support, a tentative agreement there be no more than six on any one corner. If that number, however, were to limit the placement of a non-commercial publication, I can't answer what the legal aspects of that situation would be.

THE COURT: I don't think he is asking you the legal [p. 165] aspects. If you have got a application for a permit from somebody for a newsrack, you're not concerned with what the content - what is purveying in the news box; it might be a magazine, as opposed - say it might be questionable whether it is commercial or non-commercial: you could determine from the permit and the location whether it's going to be too many boxes at that location. You say, "No, you can't put it here, but

across the street," because at every intersection there are four corners and a crosswalk; at least two sides.

THE WITNESS: On some corners there are already that number of -

THE COURT: Well, then you -

THE WITNESS: - boxes.

THE COURT: Then suppose it was a newspaper that wanted to put one there and there are too many there: what would you do in that situation? Tell them "No?"

THE WITNESS: That would certainly be my recommendation.

THE COURT: Okay. Then you can recommend. I mean, that you can regulate it, I would think, because your recommendation carries a lot of weight and a permit is not going to be granted without your approval; is it?

THE WITNESS: Well, I can be overruled.

THE COURT: Who would overrule you? Mr. Rowe?

THE WITNESS: Potentially a Director of Public Works, [p. 166] a City Manager, or City Council have that authority.

THE COURT: Okay. Well, I guess that is a chance everybody can take.

THE WITNESS: Sure.

THE COURT: But I think -

THE WITNESS: I'm not -

THE COURT: - they are going to listen to who they hired to do the job.

THE WITNESS: I'm not unwilling to listen to the suggestion.

THE COURT: If you thought it was too crowded, you would deny it or reject the permit; is that correct?

THE WITNESS: Yes.

THE COURT: Okay.

Q. By the way, Mr. Young, have you ever been overruled with regard to a recommendation you made concerning either the issuance or a revocation of a newsrack permit?

A. Subject to the outcome of this litigation, no.

Q. I'm not talking about overruled by a federal judge. I'm talking about someone within the City.

A. No.

Q. No. And is it accurate, Mr. Young, that since 1989 only two publications have requested approval to place their newsracks in the City right-of-way?

A. No, that is not accurate. There are also the Christian [p. 167] Singles publications.

Q. And -

A. That's four publications within the year essentially.

Q. And clearly no applications have been made in calendar year 1990; have they?

A. That's correct.

Q. By anyone?

A. That's correct.

Q. And you also indicated, in getting back to your concerns, that perhaps newsracks might detract from the City's safety concerns. You're not aware that the newsracks maintained by Harmon or Discovery have occasioned any safety problems; are you?

A. No more than any others.

Q. And the answer to that is, there are none; is that correct?

A. Well, there have been cases of newsracks placed at improper locations which in general the publishers have been cooperative in -

THE COURT: When you say "improper locations," are those locations where permit had been granted a newsrack for somewhere else and instead of the northwest corner where you granted the permit, they put it on a southeast corner?

THE WITNESS: More -

THE COURT: Is that what you mean?

[p. 168] THE WITNESS: More likely on the northwest corner but too close to the crosswalk or apparently obstructing the crosswalk or something of that nature.

THE COURT: Okay.

Q. And the City has the power then to require -

THE COURT: Isn't there a City ordinance about obstructing crosswalks, obstructing intersections and things like that? Aren't there other laws that say people can't do that? You give them a permit and say, "You can put something in a particular location;" they put it in that location, but they put it somewhere where it does obstruct. They would be violating the ordinance and you can order them to remove that?

THE WITNESS: I think that is the basis for which we requested repositioning and have generally gotten cooperation.

THE COURT: So you have been able to regulate those things?

THE WITNESS: Yes.

Q. Let me understand, Mr. Young, that as City Engineer you're involved with primarily safety concerns as they grow out of structures on or about the public right-of-way; is that correct?

A. That is a major part of our work but not the only one, as evidenced by this situation.

Q. I mean, as a City Engineer, what is your training which has allowed you to become the City Engineer, professional [p. 169] training?

A. I'm a civil engineer [sic] by professional background, registered civil engineer [sic] in the State of Ohio, and much of my previous experience was as City

Traffic Engineer, as the Honorable Judge has noted, and so safety of pedestrians and motorists has been a matter of prime concern throughout my career.

Q. How do those concerns in anyway depend upon a determination of whether or not a particular publication is commercial or non-commercial in nature?

A. Only again in the matter of proliferation. It has been made clear to us that we do not have the authority to prohibit the placement of non-commercial publications except as respect to specific safety problems. The matter of proliferation is a great concern because there is a finite amount of space where devices of this or any other dispensing type can be placed on the sidewalks, particularly in the Downtown area, but this applies to other areas as well. And we have - I have great difficulty in determining how we could effectively regulate a situation in whichever retail store decides that placing their advertisement folders on the sidewalk on a - perhaps in front of their own store but perhaps somewhere else - could be effectively regulated for the safety and convenience of the public.

THE COURT: Is it your position that if I find that [p. 170] this ordinance, applied in this particular case as it presently exists, is for some reason or another unconstitutional, that your concern is that every retail establishment on the skywalk and on the street level would have a right to put out sign boards along the street? That that would be - by such a decision, that we would be precluding the City from regulating the use of the right-of-way?



THE WITNESS: I'm not sure about sign boards, but in terms of printed publications – for example, the Lazarus – and I use this simply as a sample example –

THE COURT: Sure.

THE WITNESS: – as it now appears in the Sunday paper, I see nothing to prevent Lazarus from placing this publication out on the sidewalk if the – if your ruling is that this process, this regulatory process, is unconstitutional. Historically, the City has prohibited commercial advertising on the public right-of-way. We recognize that the newspapers or general circulation are a separate and distinct classification even though they do contain certainly advertising.

Q. Mr. Young, isn't it accurate that the Lazarus publication which you just commented on is in fact on the City sidewalk every day?

A. Not unless it's dropped there as litter.

Q. Isn't it distributed by means of *The Cincinnati Enquirer* [p. 171] or through the newsracks on the City right-of-way?

A. Yes, but that doesn't take an additional dispensing device.

Q. Have you ever considered asking *The Cincinnati Enquirer* to remove from its publication all of the matters which you would otherwise consider purely commercial in nature?

A. I don't think that question is one that can be answered. Of course the answer is no.

Q. And my question to you is, why not if you're seeking to prevent the distribution of commercial matter on public streets by means of newsracks?

A. Because, as I have stated, it has been made clear to us that newspapers, including their advertising content, have a special status that is essentially inviolate.

Q. Do the newspapers have a special status to distribute advertising for Lazarus's magazine that other publishers do not have?

MR. YURICK: I'll object to that.

THE COURT: No, I'm going to let – Mr. Young's handling himself very well. Overruled.

A. Would you repeat the question, sir?

Q. Does *The Cincinnati Enquirer* have a special status to distribute Lazarus's commercial publication?

A. It is my understanding that it does.

Q. Would it change the character of *The Cincinnati Enquirer* [p. 172] if you required that particular publication to devoid itself of all commercial matter including publications promoting Lazarus, information containing what's playing at the movies, information about what time the Reds' game starts and how much the tickets cost and how and where I can buy an automobile? Would that change the character of that publication?

A. Indeed it would.

Q. So a newspaper is more than just editorials and news; is that correct?

A. That's correct.

Q. Then how do you make a distinction about what constitutes commercial and what constitutes non-commercial if a newspaper is by its very nature a vehicle to convey commercial information?

A. We go back to the guideline which says predominantly news or -

THE COURT: I think it's Exhibit 2.

A. - publications primarily presenting coverage of, and commentary on, current events daily or weekly publications.

Q. Mr. Young, if I go to a newsrack and I put in a buck and a quarter on a Sunday to purchase *The Enquirer*, the only reason I have done so is because I'm interested in its real estate ads, is that paper, as far as I'm concerned, primarily devoted to editorial and news, or is it primarily devoted to realty?

A. Your interest in the paper in one section of the paper [p. 173] certainly doesn't change the nature of the paper.

Q. Says who? Where does it say that in the City code?

A. I think that's a question that stands on its - an answer that stands on its face. The fact you're interested in only one part of the newspaper doesn't change the fact that the newspaper is what it is.

Q. Have you ever gone through *The Cincinnati Enquirer* or any of the publications which you find no

problem with insofar as being distributed by newsracks to determine what is the percentage of advertising to news coverage?

A. No, I haven't.

THE COURT: Well, I think the answer - this is a debate that could go on *ad infinitum*. I think one of the considerations is if the City would dictate to the newspapers what could be included in their newspapers that are used at racks in the nature of advertising material like Lazarus's magazines, K-Mart and all the rest that are attached in the Sunday papers, if the newspaper would not be permitted to do that, it might not be able to acquire the advertising dollars of those advertisers which may have some bearing on their ability to collect the news and purvey the news, so it seems to be interrelated. I don't think it is an easy question or there is any easy answer to it. I think I understand the problem in this case and it looks sort of simple to begin with, but the more you dig into it, the more difficult it becomes.

\* \* \*